Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1998

NITRAM, INC., INDUSTRIAL RISK INSURERS, BARNARD & BURK GROUP, INC., BARNARD AND BURK ENGINEERS & CONSTRUCTORS, INC., ISI, INC., AMERICAN HOME ASSURANCE CO.,

Petitioners,

vs.

MAN GUTEHOFFNUNGSHUTTE GmbH,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Chapter II of the Federal Arbitration Act (9 U.S.C. § 201 *et seq.*) is the sole basis for jurisdiction in this case, although not invoked by any of the parties nor the United States District Judge.

2. Whether the treaty entitled the **"New York Convention on Recognition and Enforcement of Foreign Arbitral Awards"** (the "New York Convention") applies in this case to restrict the standards for review of the United States District Court's judgment confirming the arbitration award, rather than the law of Florida which had been selected by the parties to govern the arbitration proceedings.

3. Whether the Eleventh Circuit, in its Opinion, departed from the essential requirements of law by upholding the District Court's ruling permitting the Defendant, MAN GHH, to place into evidence a document (and permit testimony concerning it) which had not been disclosed to the Petitioner as required by the order of procedure, thus depriving Petitioner of a fair hearing.

4. Whether the Opinion of the Eleventh Circuit violates Petitioner's rights to due process of law.

LIST OF ALL PARTIES TO THE PROCEEDING

The following corporations and individuals have an interest in the outcome of this case. The only interest of American Home Assurance is that it was among the parties against whom costs were taxed by the arbitrators. Among the Petitioners, however, Employers Insurance of Wausau is responsible for those costs pursuant to agreement.

AMEC, plc, a British corporation which is the parent of Barnard and Burk Group, Inc.; Barnard and Burk Engineers & Constructors, Inc., and ISI, Inc.

American Home Assurance, which is a wholly owned subsidiary of American International Group, Inc., (AIG)

American International Group, Inc.

Barnard and Burk Engineers & Constructors, Inc., a wholly owned subsidiary of AMEC, plc

Barnard and Burk Group, Inc., a wholly owned subsidiary of AMEC, plc

Thomas B. DeWolf, Esq., of Thomas B. DeWolf, P.A., attorney for Employers Insurance of Wausau

Mark E. Grantham, Esq., of Hunton & Williams

Employers Insurance of Wausau, A Mutual Company

ISI, Inc., which changed its name to Sunland Service, Inc., and which is a wholly owned subsidiary of AMEC, plc

Industrial Risk Insurers; Industrial Risk Insurers is a syndicate in which the following insurance companies have an interest:

Aetna Casualty and Surety Company
American Casualty Company
Centennial Insurance Company
Commercial Union Insurance Company
Connecticut Indemnity Company
Continental Casualty Company
Continental Insurance Company
Federal Insurance Company
Fidelity & Casualty Company
Fireman's Fund Insurance Company
Fireman's Insurance Company of Newark
General Accident Insurance Company of America
Glens Falls Insurance Company
Great American Insurance Company
Hanover Insurance Company, The
Hartford Accident & Indemnity Company
The Home Insurance Co.
Insuarnce Co. of North America
Monarch Insurance Co. of Ohio
The National Fire Insurance Co.
National Surety Corp.
National Union Fire Insurance Co.
New Hampshire Ins. Co.
Northbrook Property and Casualty Ins., Co.
Northern Insurance Co. of New York
Northwestern National Ins. of Milwaukee
Pacific Indemnity Co.
Providence Washington Insurance
Reliance Insurance Co.
Royal Insurance Co. of America
St. Paul Fire & Marine Insurance
State Farm Fire & Casualty Co.

Sun Insurance Office, Ltd.
Travelers Indemnity Co., The
United States Fidelity & Guaranty Co.
United States Fire Insurance Co.
Zurich Insurance Co.

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STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was entered on May 22, 1998. A timely Petition for Rehearing was denied on August 23, 1998. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

TREATY PROVISION INVOLVED

The treaty provision involved is the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). The treaty is reprinted in 9 U.S.C. § 201 *et seq.*, a copy of which is attached as part of the Appendix to this petition.

STATEMENT OF THE CASE

This case began as a law suit filed by the Petitioner, Nitram, et al, (hereafter referred to as Barnard and Burk) against the Respondent, Man Guehoffnungshutte GmbH, (hereafter referred to as MAN GHH) for damages resulting from the failure of certain equipment purchased by Nitram from MAN GHH. The purpose of the equipment was to create greater efficiency in the operation of a fertilizer plant, by utilizing heated gases from the manufacture of certain fertilizer to generate electric power and assist in the running of the plant. When the equipment was put through "start up," there was a breakdown, which resulted in great damage to the equipment and other elements of the

plant. The issue was whether the breakdown was a result of negligence of MAN GHH in the manufacture of the equipment or due to the negligence of Barnard and Burk in designing the piping that was necessary for the equipment to work.

While the suit was pending Barnard and Burk settled Nitram's claim against it, and proceeded against MAN GHH through subrogation and crossclaim. In the lawsuit, MAN GHH, filed a motion to compel arbitration based on the agreement between the parties and arbitration was ordered by the United States District Judge to be held in Tampa, Florida, to be governed by the laws of the State of Florida in accordance with the agreement. An arbitration hearing took place before a panel of the American Arbitration Association Arbitrators over a period of several weeks in February and April, 1993, and an award was rendered in favor of MAN GHH, denying Barnard and Burk's claim. Barnard and Burk filed a motion to set aside the award and MAN GHH filed a motion to confirm the award, with the United States District Court. On July 8, 1994, the United States District Judge entered a decision in essence confirming the award and further awarding costs and interest in favor of MAN GHH. A copy of the United States District Court's Order is included in the Appendix hereto.

An Appeal was taken by Barnard and Burk of the District Court's Order, to the United States Court of Appeals for the Eleventh Circuit.

It is the decision and opinion of the Court of Appeals that Petitioner wishes to have reviewed by this Court.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED IN ORDER TO ESTABLISH THE LEGAL PRINCIPLES TO BE APPLIED AS A STANDARD OF REVIEW IN AN INTERNATIONAL ARBITRATION CASE WHERE A UNITED STATES DISTRICT COURT JUDGMENT, CONFIRMING AN ARBITRATION AWARD, IS BEING APPEALED WITHIN THE UNITED STATES.

A. This issue has not been, but should be, resolved and clarified by this Court.

Certiorari should be granted because the principal issue in the case is of great significance to the whole field of international arbitration. The question is: what legal principles are to be applied as a standard of review in an international arbitration case where a United States District Court Judgment, confirming an arbitration award, is being appealed within the jurisdiction where the arbitral award was rendered, (in this case, the United States)? This issue has not been, but should be, resolved and clarified by this Court.

The New York Convention is a treaty which was entered into by many nations, including the United States, and became effective in 1958. The purpose behind the treaty was to promote arbitration proceedings as a means of dispute resolution in commercial disputes which are international in nature. A dispute is international in nature if it involves parties who are citizens of different countries which are signatories to the treaty. The treaty aims to accomplish this purpose by facilitating the enforcement of arbitral decisions rendered in one signatory country through the courts of another signatory country. There

can be no other reason for the New York Convention to exist. However, the all-inclusive definition in Article I(1) of the New York Convention, includes within the term, "international proceedings," an action brought to enforce an arbitral decision in the courts of the country where the decision was rendered. The definition is as follows:

> Article I(1). This shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. **It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.**

One of the purposes of the treaty is to see that each of the parties to an international arbitral proceeding is treated fairly. However, as applied by the Eleventh Circuit in this case, it would have the opposite effect and would result in a denial of due process.

For example, if an arbitration were brought in Germany, (a signatory) between a United States company and a German company, and the arbitral award was appealed in Germany, the domestic law of Germany would apply to the legal issues in the case. After appeals have been exhausted and the German company seeks enforcement of the arbitration Order in the United States, the United States company is limited in its defense, to the matters set forth in Article V of the New York Convention. This is as it should be.

However, while the arbitral award is still subject to appeal and modification, the law of the country where the proceedings

are pending, and the law specified by the parties in their agreement, should be the appropriate standard for determination of the validity of the arbitral decision. *Fertilizer Corp. of India v. IDI Management, Inc., D.C. Ohio 1981*, 517 F. Supp. 948; *Tesoro Petroleum Corp. v. Asamera Ltd., W.D. Tex. 1992*, 798 F. Supp. 400.

In *Spier v. Calzaturificio Tecnica S.p.A. S.D.N.Y. 1987*, 663 F. Supp. 871, a district court considering a suit to enforce an arbitral award made in Italy, held that enforcement proceedings could be filed while the appeal of the award was pending in Italy. However, the court made it clear that the law to be applied on the appeal in Italy was Italian substantive law and not the standard of review provided by the New York Convention. The court in its decision took an adjournment of the enforcement proceedings pending finality of the award by the court in Italy.

This discussion leads to the central point in Petitioner's case. The opinion of the Eleventh Circuit holds, in essence, that jurisdiction in this case is founded upon Chapter 2 of the Federal Arbitration Act, 9 U.S.C. § 201 *et seq.*, and the issues are limited by Article V of the New York Convention, even though neither party sought jurisdiction under Chapter 2 of the FAA and the United States District Court below entered its Judgement without reference to Chapter 2, or the New York Convention. Since the New York Convention does not mention "fairness" as a basis for defense to an enforcement action, the Eleventh Circuit opined that, Petitioner's argument that the arbitrators admission of a document in evidence in the case, contrary to the terms of its own pre-trial procedural order should be rejected.

Even though this is an international arbitration, as defined under Article I(1), of the New York Convention, that does not

mean that the standards for procedural due process are different at the appellate level than they were at the trial level. In order to clarify and standardize the procedures governing international arbitrations, this Court should issue a ruling that:

> IN INTERNATIONAL ARBITRATION CASES WHERE THE ARBITRATION OCCURS IN THE UNITED STATES AND THE PARTIES HAVE STIPULATED THAT THE LAW OF A STATE, (IN THIS CASE, FLORIDA), WOULD APPLY TO THE ARBITRATION PROCEEDINGS, SUCH LAW IS THE STANDARD OF REVIEW UNTIL APPEALS ARE CONCLUDED.

A corollary ruling would be that:

> ARTICLE V OF THE NEW YORK CONVENTION APPLIES ONLY TO ACTIONS BROUGHT TO ENFORCE A FOREIGN ARBITRATION JUDGMENT ENTERED IN A COUNTRY OTHER THAN THE COUNTRY WHERE THE ARBITRATION IS PENDING.

The standard for review of the legal issues in this case should be:

1. The agreement of the parties, on all issues.

2. The Rules of the American Arbitration Association.

3. The law of the State of Florida.

4. The constitutional law of the United States, and in particular, the requirement of "essential fairness" and procedural due process of law.

II.

THE WRIT SHOULD BE GRANTED TO CORRECT THE CONCLUSION CONTAINED IN THE OPINION OF THE ELEVENTH CIRCUIT THAT THE REQUIREMENT OF "BASIC FAIRNESS" IS NOT APPLICABLE TO INTERNATIONAL ARBITRAL PROCEEDINGS IN THE UNITED STATES.

A. In rendering its opinion the Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Supreme Court's supervisory power.

Certiorari should be granted to correct the conclusion contained in the opinion of the Eleventh Circuit that the requirement of "basic fairness" is not applicable to international arbitral proceedings in the United States. In rendering its opinion the Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Supreme Court's supervisory power, in condoning the failure of a party to comply with procedural safeguards in disclosing important pieces of evidence, which results in an unfair and prejudicial proceeding with respect to one of the parties.

The authorities writing on the subject of the New York Convention recognize this requirement, and in fact, Mr. G. Richard Shell, quoted in the Eleventh Circuit's Opinion, states that enforceability of international awards under the act are —

> "subject only to minimal standards of domestic judicial review for basic fairness and consistency with national public policy." G. Richard Shell, "Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization," 44 Duke L.J. 829, 888 (1995)

III.

THE PETITION SHOULD BE GRANTED TO CORRECT THE OPINION OF THE ELEVENTH CIRCUIT CONDONING THE FAILURE OF A PARTY TO COMPLY WITH PROCEDURAL SAFEGUARDS IN THE ARBITRATION PROCEEDINGS. SUCH FAILURE RESULTS IN A DENIAL OF DUE PROCESS TO PETITIONER.

A. In rendering its opinion the Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Supreme Court's supervisory power.

The element of basic fairness in any proceeding in any Court in the United States is fundamental and mandated by the Constitution. Its application is generally founded on the "Procedural Due Process" provision of the Fifth Amendment. *Rachin v. People of Cal.*, 341 U.S. 165 (1952). If the New York Convention and Chapter 2 of the FAA eliminates "essential fairness" as a standard, then the law and the convention violate the Fifth Amendment of the Constitution.

The Eleventh Circuit's opinion dealing with the admission of the TUV report contains serious inaccuracies. The opinion of the Court refers to the Order of the Arbitrators requiring production by both sides of certain documents and information by June 12, 1992, and it is the Eleventh Circuit's conclusion that the TUV report would not fall within the category of things which had to be produced and exhibited between the parties. That Order contemplated a hearing taking place in September 1992, and when the hearing date was postponed to January 1993, a new stipulation and order were entered calling for production and exhibition by October 31, 1992, and one of the documents

to be exchanged was expressly required to be "a list of all significant documents and exhibits which each party planned to offer." The record shows that both parties provided summaries of expert opinions, reports and a list of significant documents which each party planned to introduce into evidence. However, the Respondent, in violation of the agreement, failed to list the TUV report, although it had had the report in its possession since May 1992. The Eleventh Circuit's reference to the circumstances under which the TUV report was entered into evidence on Page 24 of the opinion, footnote 13, is as follows:

> Respondents also argue that the admission of the TUV report at a relatively late date violated the panel's own prehearing order. That order provides that:
>
> > [e]ach side shall submit its expert witnesses' reports, witness depositions, or excerpts, to be relied upon, and expert witness summarized/affidavits, which shall include the experts' backgrounds and history, in quadruplicate, to the Association, for transmittal to the Arbitrators, by June 12, 1992.
>
> The admission of such documents after June 12, 1992, in contravention of the panel's order, might or might not violate the agreement of the parties. We need not reach that question, however, because the TUV report was an exhibit, not an "expert witness[ ]' report[ ], witness deposition[ ] . . . excerpt[ ] . . . expert witness summar[y,] [or] affidavit[ ]." Its production was therefore not required by the prehearing order, and that order was not violated by its late production.

This reference by the Court is totally erroneous and the error is serious indeed. The actual Order, based upon the agreement of the parties, which governs the TUV report, was the Order entered by the arbitration panel dated June 24, 1992. This Order provides in part:

* * *

> 2) The Respondents' request for relief from filing experts' reports on July 31st is granted. In light of the rescheduling of the hearings to January, the filing timetable is rearranged as follows:
>
> a) Experts' Reports are due October 31st, with Replies, if any, due November 15th.
>
> b) Witness Deposition Excerpts are due October 31st, with Replies/Supplements, if any, due November 15th.
>
> c) Witness Affidavits are due October 31st, with Relies/Supplements, if any, due November 15th.
>
> **d) The List of key Documents, with appropriate copies, is due October 31st.**
>
> e) The Schedule of Damages is due October 31st.

The Eleventh Circuit's opinion, on page 21, correctly quotes the text of Rule 3 of the AAA's supplementary procedures for International Commercial Arbitration, as follows:

> At the request of any party, the AAA will make arrangements for the exchange of documentary

> evidence or lists of witnesses between the parties. In international cases, it is important that parties be able to anticipate what will transpire at the hearing. By cooperating in an exchange of relevant information, the parties can avoid unnecessary delays.

Pursuant to this rule the arbitration panel issued its Order, based on the stipulation of the parties, requiring exchanges of documents as set forth in its terms. The Order of June 24, 1992, requires production of the matters specified by October 31, 1992. Included in the required production is a "list of documents to be offered by each party." Although the Respondent did submit its list of documents, the TUV report was not referred to therein, nor anything that would give notice of its existence. Had the TUV report been listed as a document to be offered, the Petitioner would have had the opportunity to review the document; submit the document for analysis to its experts; and take depositions of those people who were responsible for preparing the document. Since the document was prepared by a concern in Germany and is very complex in nature, these things would take considerable effort and time to accomplish. As it was, the document was presented to the Petitioners by the Respondents on the Friday, January 20, 1993, two days, (Saturday and Sunday), before the arbitration hearing was to commence. The element of fundamental unfairness of this procedure cannot be brushed aside as harmless error. The TUV report was used by a Respondent witness as a basis for his testimony that the MAN GHH furnished equipment was not the cause of the breakdown. The prejudicial affect of this is further compounded by the great distraction which the last minute presentation of this TUV report had on the Petitioner's ability to prepare and present its case.

Aside from the effect of the report itself, this tactic is something which ought to be strictly prohibited. The other element of prejudice which makes this situation doubly damaging is the fact that the Petitioner meticulously complied with the terms of the disclosure production and exchange agreement in producing documents by October 31, 1992, and the Respondent violated the agreement by not disclosing the TUV report. The complying party would be better off if there were no rules at all for disclosure. At least they would be on equal footing.

CONCLUSION

Because of the important questions presented in this case the Supreme Court should grant certiorari to provide a clear standard for appeals in international arbitration cases and overrule the opinion of the Circuit Court of Appeals insofar as it denies Petitioner's rights to due process of law.

Accordingly, Petitioner respectfully requests that its Petition for Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED MAY 22, 1998

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-2982

D.C. Docket No. 85-1770-CIV-T-17

INDUSTRIAL RISK INSURERS, BARNARD & BURK GROUP, INC., BARNARD AND BURK ENGINEERS AND CONSTRUCTORS, INC., ISI, INC., AMERICAN HOME ASSURANCE CO.,

Defendants-Third-Party-Plaintiffs-Appellants,

versus

M.A.N. GUTEHOFFNUNGSHÜTTE GmbH,

Third-Party-Defendant-Appellee-Cross-Appellant.

No. 24-2530

D.C. Docket No. 85-1770-CIV-T-17

HOLLAND & KNIGHT, MARK E. GRANTHAM,

Appellants,

versus

Appendix A

INDUSTRIAL RISK INSURERS, BARNARD & BURK GROUP, INC., BARNARD AND BURK ENGINEERS AND CONSTRUCTORS, INC., ISI, INC., AMERICAN HOME ASSURANCE CO.,

Defendants-Third-Party-Plaintiffs-Appellees.

Appeals from the United States District Court
for the Middle District of Florida.

(May 22, 1998)

Before TJOFLAT and EDMONDSON, Circuit Judges, and NANGLE*, Senior District Judge.

TJOFLAT, Circuit Judge:

Industrial Risk Insurers, Barnard and Burk Group, Inc., Barnard and Burk Engineers and Constructors, Inc., ISI, Inc., and American Home Assurance Company[1] appeal from the district court's denial of their motion to vacate an international commercial arbitration award. On cross-appeal, respondent M.A.N. Gutehoffnungshütte GmbH ("MAN GHH") challenges the district court's denial of pre-judgment interest. In a separate appeal, MAN GHH challenges the district court's imposition of sanctions under Federal Rule of Civil Procedure 11. We affirm the district court's denial of the motion to vacate the

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* Honorable John F. Nangle, Senior U.S. District Judge for the Eastern District of Missouri, sitting by designation.

1. The only interest of American Home Assurance in this appeal is that it is among the parties against whom costs were imposed by the arbitral panel. As stated *infra* part I.C, we affirm that costs award. We omit any further reference to American Home Assurance for clarity's sake.

award. We vacate the district court's denial of prejudgment interest, however, and remand for reconsideration of that issue. We also reverse the district court's imposition of Rule 11 sanctions.

I.

This complex commercial litigation began over a decade ago, in 1985.[2] Nitram, Inc., a Florida nitric acid manufacturer, contracted with Barnard and Burk Group, Inc., a Texas corporation, for the provision and installation of a tail gas expander in Nitram's Tampa, Florida nitric acid manufacturing plant.[3] Barnard and Burk Group then engaged Barnard and Burk Engineers and Constructors, Inc., a Louisiana corporation, to perform the design engineering work for the installation, and engaged ISI, a Louisiana corporation, to perform the construction work.[4] (We refer hereinafter to the Barnard and Burk Group, Barnard and Burk Engineers and Constructors, and ISI, collectively, as "Barnard and Burk"). Barnard and Burk Group in turn contracted to purchase the tail gas expander from M.A.N. Maschinenfabrik Augsburg-Nürnberg AG, a German turbine manufacturer. MAN GHH, the Appellee/Cross-Appellant in this appeal, is a spin-off corporation of, and the successor-in-interest to, M.A.N. Maschinenfabrik Augsburg-

---

2. We recite only those facts and prior proceedings necessary to an understanding of the issues raised on appeal.

3. A tail gas expander is essentially a turbine which generates electricity from waste gasses given off in the nitric acid manufacturing process.

4. Barnard and Burk Engineers and Constructors, Inc., and ISI, Inc., are both wholly-owned subsidiaries of Barnard and Burk Group.

Appendix A

Nürnberg AG. MAN GHH was responsible for designing, manufacturing, and delivering a functional tail gas expander and for providing technical guidance regarding its installation; Barnard and Burk was responsible for the piping required to put the expander into service.

The tail gas expander was installed in the Tampa plant in late 1984 and early 1985. On January 16, 1985, during start-up procedures, moving and stationary components of the expander came in contact with each other. This caused a "wreck" of the machine, deforming its rotor, scarring its stator casing and destroying seals. Parts of the expander were returned to Germany for repair and the piping was modified. On March 23, 1985, during a second attempt to start the turbine, the expander suffered a second wreck. *See Nitram, Inc. v. Industrial Risk Insurers et al.*, 848 F.Supp. 162, 164 (M.D. Fla. 1994). The machine was rebuilt again and after further piping modifications, it ran successfully; the two wrecks, however, had resulted in months of down time and millions of dollars in damages.

Nitram had purchased business risk insurance from Industrial Risk Insurers ("IRI"), a Hartford, Connecticut, consortium of insurance companies that provides business risk insurance to certain large manufacturing, processing, and industrial concerns.[5] IRI refused to pay Nitram for the losses caused by the first wreck under Nitram's business risk policy with IRI, arguing that the wrecks were caused by Barnard and Burk's poor design and defective piping, and that the losses

5. Several other companies were parties to the litigation in the district court in various capacities, but were not parties to the arbitral proceeding that gives rise to this appeal, and are consequently not parties to this appeal. We omit reference to them for clarity's sake.

due to the wrecks therefore were not covered by the policy. IRI acknowledged that the policy did cover some of the losses due to the March wreck and made payment for those losses under the policy. In October of 1985, Nitram sued both IRI and Barnard and Burk in Florida state court, arguing *inter alia* that *one* of them had to pay for the remaining losses: if Barnard and Burk was at fault for the wrecks, Nitram argued, then Barnard and Burk was liable; if Barnard and Burk was not at fault, then the loss due the wrecks was covered by Nitram's policy with IRI. IRI, as Nitram's subrogee, cross-claimed against Barnard and Burk for the amount of the partial payment IRI had made to Nitram under its policy. Defendants IRI and Barnard and Burk then removed the case to the district court on grounds of diversity, and Barnard and Burk counterclaimed against Nitram, alleging various breaches of contract by Nitram.

Barnard and Burk proceeded to file a third-party claim against MAN GHH, asserting that MAN GHH's faulty expander, and not Barnard and Burk's design or piping, caused the two wrecks, and that MAN GHH was therefore required to indemnify Barnard and Burk for various costs and for lost business. Nitram then settled with IRI, and its claims against IRI were dismissed. As a result, IRI was subrogated to Nitram's claims against Barnard and Burk.

In April of 1987, MAN GHH moved to compel arbitration of Barnard and Burk's third-party claim against it, pursuant to an arbitration provision in its contract with Barnard and Burk for the design, manufacture, and purchase of the expander. That provision, as amended, provided for binding arbitration in Tampa under the rules of the American Arbitration Association and under Florida law. The district court ordered arbitration pursuant to this provision in July of 1987.

Appendix A

In December of 1987, Nitram amended its complaint to state claims directly against MAN GHH. Nitram brought tort and breach-of-warranty claims alleging that the expander was defectively designed and manufactured by MAN GHH, and demanding indemnification in case Nitram was held liable to Barnard and Burk. IRI, as Nitram's subrogee, added a cross-claim against MAN GHH for good measure. In August of 1988, MAN GHH moved for, and the district court ordered, arbitration of these claims as well.

Barnard and Burk then settled with Nitram, and with IRI, leaving the arbitrators to determine:

1. Barnard and Burk's third-party complaint against MAN GHH;

2. Nitram's complaint against MAN GHH; and

3. IRI's cross-claim against MAN GHH as Nitram's subrogee.

All of these claims turned on whether the two wrecks were caused by MAN GHH's expander or by Barnard and Burk's design and piping. The arbitration panel heard testimony in January and March of 1993.

Also in March of 1993, while the arbitration proceedings were pending, Barnard and Burk moved for Rule 11 sanctions against MAN GHH, arguing that MAN GHH had improperly attempted to relitigate the issue of the arbitral venue, which had already been decided by the district court. The district court agreed and imposed sanctions upon MAN GHH's counsel in July of 1993. *See Nitram, Inc. v. Industrial Risk Insurers,* 149 F.R.D. 662 (M.D. Fla. 1993).

Appendix A

In May of 1993, the arbitrators returned an award in favor of MAN GHH, concluding that Barnard and Burk's design and piping, not MAN GHH's tail gas expander, had caused the two wrecks. The panel also awarded MAN GHH costs and conversion rate compensation.

Barnard and Burk then moved the district court to vacate the arbitration awards, on grounds that the principal arbitral award was "arbitrary and capricious" and that the arbitration panel improperly and prejudicially admitted certain testimony and evidence, and that the costs award and conversion rate compensation award should be vacated along with the principal award. The district court denied the motion and confirmed the panel's awards. *See Nitram,* 848 F.Supp. 162. Barnard and Burk now appeals the denial of that motion, asking four questions:

1. Whether the arbitrators' failure to conduct the arbitration in strict conformity with the agreement of the parties required the district court to vacate the principal arbitral award;

2. Whether the award should be vacated because of the panel's admission of 1) a technical report that was proffered at a relatively late date in the proceedings, and 2) the testimony of an expert who had been previously retained by IRI and who provided opinions against Barnard and Burk's interests;

3. Whether the district court abused its discretion in determining that the arbitration awards were not "arbitrary and capricious;" and

4. Whether the conversion rate and costs awards should be vacated along with the principal award.

Appendix A

On cross-appeal, MAN GHH challenges the district court's refusal to award to MAN GHH prejudgment interest from the date of the last arbitral award through the date of the district court's judgment confirming the arbitral award. MAN GHH also brings a separate appeal challenging the district court's imposition of Rule 11 sanctions.

I.

As a threshold matter, we must determine the source of our jurisdiction. We must inquire *sua sponte* into the source of our jurisdiction whenever it might be in question. *See Miscott Corp. v. Zaremba Walden Co.*, 848 F.2d 1190, 1192 (11th Cir. 1988). The district court proceeded in the belief that its jurisdiction was grounded in diversity, and that its treatment of the arbitral proceedings was therefore controlled by Chapter 1 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16 (1994), which covers domestic arbitral proceedings. We conclude that the district court was in error, and hold that the case is controlled by Chapter 2 of the FAA, 9 U.S.C. §§ 201-208, which covers international arbitral proceedings.

The instant case presents an issue of first impression in this court: Do the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), and thus the provisions of Chapter 2 of the FAA, govern an arbitral award granted to a foreign corporation by an arbitral panel sitting in the United States and applying American federal or state law? We hold that they do.

The New York Convention was drafted in 1958 under the auspices of the United Nations. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards,

opened for signature June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3. The United States acceded to the treaty in 1970, and Chapter 2 of the FAA was passed that same year. The purpose of the New York Convention, and of the United States' accession to the convention, is to "encourage the recognition and enforcement of international arbitral awards," *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983), to "relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that [is] speedier and less costly than litigation." *Ultracashmere House, Ltd. v. Meyer*, 664 F.2d 1176, 1179 (11th Cir. 1981). *See also generally* Leonard V. Quigley, "Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards," 70 *Yale L.J.* 1049 (1961) (recounting the deliberations of the New York Convention and describing accession's benefits for the U.S.). The Convention, and American enforcement of it through the FAA, "provide[ ] businesses with a widely used system through which to obtain domestic enforcement of international commercial arbitration awards resolving contract and other transactional disputes, subject only to minimal standards of domestic judicial review for basic fairness and consistency with national public policy." G. Richard Shell, "Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization," 44 *Duke L.J.* 829, 888 (1995).

The New York Convention is incorporated into federal law by the FAA, which governs the enforcement of arbitration agreements, and of arbitral awards made pursuant to such agreements, in federal and state courts. *See Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 269-73, 115 S.Ct. 834, 837-39, 130 L.Ed.2d 753 (1995). Chapter 2 of the Act, 9 U.S.C. §§ 201-208, mandates the enforcement of the New York

Convention in United States courts. *See* 9 U.S.C. § 201. Chapter 2 generally establishes a strong presumption in favor of arbitration of international commercial disputes, *see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638-40, 105 S.Ct. 3346, 3359-61, 87 L.Ed.2d 444 (1985), and creates original federal subject-matter jurisdiction over any action arising under the Convention. *See* 9 U.S.C. § 203; H.R. Rep. No. 91-1181, at 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3601, 3602 ("Section 203 gives original jurisdiction over any action or proceeding falling under the Convention to the district courts of the United States regardless of the amount in controversy."). As an exercise of the Congress' treaty power and as federal law, "[t]he Convention must be enforced according to its terms over all prior inconsistent rules of law." *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l. Oil Co. (Pemex)*, 767 F.2d 1140, 1145 (5th Cir. 1985).

The Convention by its terms applies to only two sorts of arbitral awards: 1) awards made in a country other than that in which enforcement of the award is sought, and 2) awards "not considered as domestic awards in" the country where enforcement of the award is sought. It is apparent that the arbitral award at issue in the instant case does not fall within the first category. We hold, however, that it does fall within the second category. Section 202 of the FAA provides that all arbitral awards arising out of commercial relationships fall under the Con- ention, except for those awards that "aris[e] out of . . . a [commercial] relationship which is entirely between citizens of the United States. . . ." 9 U.S.C. § 202.[6] We read

6. The entire section reads:

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is

(Cont'd)

this provision to define all arbitral awards not "entirely between citizens of the United States" as "non-domestic" for purposes of Article I of the Convention. We join the First, Second, Seventh, and Ninth Circuits in holding that arbitration agreements and awards "not considered as domestic" in the United States are those agreements and awards

> which are subject to the Convention not because [they were] made abroad, but because [they were] made within the legal framework of another country, e.g., pronounced in accordance with foreign law *or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction.* We prefer this broad[ ] construction because it is more in line with the intended purpose of the treaty, which was entered into to encourage the recognition and enforcement of international arbitration awards.

(Cont'd)

> considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

9 U.S.C. § 202.

Bergesen, 710 F.2d at 932 (emphasis added) (internal citation omitted); *see also Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 18-19 (2d Cir. 1997); *Jain v. de Mere*, 51 F.3d 686, 689 (7th Cir. 1995) (stating that the New York Convention and § 202 "mandate[ ] that any commercial arbitral agreement, unless it is between two United States citizens, involves property located in the United States, and has no reasonable relationship with one or more foreign states, falls within the Convention"); *Ministry of Defense of the Islamic Republic of Iran v. Gould Inc.*, 887 F.2d 1357, 1362 (9th Cir. 1989) (holding that New York Convention applies when arbitral "award (1) . . . arise[s] out of a legal relationship (2) which is commercial in nature and (3) which is not entirely domestic in scope", and that the award at issue was "obviously not domestic in nature because Iran [was] one of the parties to the agreement"); *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186-87 (1st Cir. 1982) (stating that Chapter 2 mandates enforcement of a written commercial arbitral agreement when one of the parties to the agreement is not an American citizen). Specifically for purposes of the case *sub judice*, we hold that an arbitral award made in the United States, under American law, falls within the purview of the New York Convention—and is thus governed by Chapter 2 of the FAA—when one of the parties to the arbitration is domiciled or has its principal place of business outside of the United States.

MAN GHH is a German corporation. The arbitral award granted to it by the Tampa panel is therefore non-domestic within the meaning of § 202 of the FAA and article 1 of the New York Convention.[7] We therefore hold federal subject-matter jurisdiction over this appeal.

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7. The appellants argue that the award at issue does not fall under the Convention because MAN GHH's American subsidiary was also a (Cont'd)

Appendix A

II.

Having established the source of our jurisdiction, we move to address the appeal on the merits. The Tampa panel's arbitral award must be confirmed unless appellants can successfully assert one of the seven defenses against enforcement of the award enumerated in Article V of the New York Convention.[8]

(Cont'd)
party to the arbitration. The presence of the subsidiary does not, however, take the award out of the purview of the Convention, so long as the foreign parent was a party to the proceeding.

8. Article V reads:

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> (a) The parties to the agreement . . . were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>
> (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
>
> (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the

(Cont'd)

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See Imperial Ethiopian Gov't v. Baruch-Foster Corp., 535 F.2d 334, 335-36 (5th Cir. 1976);[9] *see also National Oil Corp. v.*

(Cont'd)

> decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
>
> (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
>
> (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
>
> 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. 5, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 2520, 330 U.N.T.S. 3, *reprinted in* 9 U.S.C.A. § 201 note (West supp. 1997). The New York Convention's enumeration of defenses against enforcement is exclusive. *See* part II.C, *infra*.

9. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

Libyan Sun Oil Co., 733 F.Supp. 800, 813 (D. Del. 1990). The appellants bear the burden of proving that any of these seven defenses is applicable. *See Imperial Ethiopian Gov't*, 535 F.2d at 336.

Only two of the seven enumerated defenses might apply to the instant case. The first is that found in Article V(1)(d), which provides that a court may refuse to confirm an international arbitral award if "the arbitral procedure was not in accordance with the agreement of the parties." The second is that found in Article V(2)(b), which provides that a court may refuse to enforce an arbitral award if "the recognition or enforcement of the award would be contrary to the public policy of" the country where enforcement is sought.

The appellants argue that the procedures of the Tampa panel were not in accordance with the parties' arbitration agreement,[10] and that the award therefore should not have been confirmed. They argue that the panel should not have considered the

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10. The appellants make this assertion in support of their argument that the arbitration proceedings did not conform to the requirements of Chapter 1 the FAA. The nonconformity of arbitral procedures to the agreement of the parties "is a defense under both the [FAA] and the New York Convention. The wording is slightly different but there is no reason to think the meaning different." *Lander Co. v. MMP Invs., Inc.*, 107 F.3d 476, 481 (7th Cir. 1997) (internal citation omitted). We therefore treat the appellants' argument that the nonconformity of the arbitral procedures to the agreement of the parties violated Chapter 1 of the FAA as an argument that that nonconformity was a violation of the New York Convention and Chapter 2. Likewise, we treat the appellants' argument that the admission of Hansen's testimony was a violation of public policy warranting vacatur of the award under Chapter 1 as an argument for vacatur under Chapter 2.

contents of a technical report on the wrecks provided by the German technical institute Rheinisch-Westfälischer Technischer Überwachung Verein (the "TÜV report"), because that report was provided to the appellants at a relatively late date, very shortly before the proceedings began. In considering that report, the appellants argue, the arbitration panel violated the rules of the American Arbitration Association, which were the agreed-upon rules of procedure for the arbitration. The appellants also assert that the panel should not have heard the testimony of Donald Hansen, a piping expert who had previously been retained by Respondent IRI to inspect the tail gas expander onsite at the Tampa plant after the first wreck and who was directly involved in the redesign of the expander before the second wreck. Allowing this testimony, the appellants argue, violated "the well-established public policy protecting . . . fundamental principles of fairness and professional conduct." The appellants also assert a defense that is not enumerated by the New York Convention: that the arbitral award should be vacated on the ground that it is "arbitrary and capricious."

We review *de novo* the district court's determinations that the procedures observed by the arbitrators were in accordance with the agreement of the parties, that the admission of Hansen's testimony was not violative of public policy, and that the award was not "arbitrary and capricious." *See First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 947-49, 115 S.Ct. 1920, 1926, 131 L.Ed.2d 985 (1995) (requiring *de novo* review of questions of law involved in a district court's refusal to vacate an arbitral award). We hold that the admission of the TÜV report was in accordance with the AAA rules and therefore with the agreement of the parties. We also hold that the admission of Hansen's testimony was not a violation of public policy of the

sort required to sustain a defense under the New York Convention. We further hold that no defense against enforcement of an international arbitral award under Chapter 2 of the FAA is available on the ground that the award is "arbitrary and capricious," or on any other grounds not specified by the Convention.

A.

Rule 3 of the AAA's Supplementary Procedures for International Commercial Arbitration provides that

> [a]t the request of any party, the AAA will make arrangements for the exchange of documentary evidence or lists of witnesses between the parties. In international cases, it is important that parties be able to anticipate what will transpire at the hearing. By cooperating in an exchange of relevant information, the parties can avoid unnecessary delays.

The TÜV report was provided to the appellants on Jan. 8, 1993 — the Friday before the Monday when the arbitration proceedings began — and was not admitted into evidence by the arbitrators until March 26, 1993. The appellants objected to its admission at that time and were allowed to cross-examine Hansen about the institute's report and about his conclusions based on it. The appellants also rebutted Hansen's testimony with testimony from experts of their own.

MAN GHH did produce the TÜV report very shortly before the commencement of the arbitration proceedings. But arbitration proceedings "need not follow all the 'niceties' of

the federal courts; [they] need provide only a fundamentally fair hearing."[11] *Grovner v. Georgia-Pacific,* 625 F.2d 1289, 1290 (5th Cir. Unit B 1980).[12] "An arbitrator enjoys wide latitude in conducting an arbitration hearing. Arbitration proceedings are not constrained by formal rules of procedure or evidence." *Robbins v. Day,* 954 F.2d 679, 685 (11th Cir. 1992), *overruled on other grounds, Kaplan,* 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985. Arbitration rules, such as those of the AAA, are intentionally written loosely, in order to allow arbitrators to resolve disputes without the many procedural requirements of litigation.

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11. The appellants rely on this language from *Grovner* as an independent ground for their argument that the arbitral award should not be enforced: they argue that, because the TÜV report was admitted into the arbitral proceedings on such short notice, and because Hansen's testimony was admitted, the proceedings were fundamentally unfair, and the awards arising from that proceeding should be vacated. As a threshold matter, we note that this argument assumes that a defense against enforcement of an international arbitral award is available on the ground that the arbitral proceeding is "fundamentally unfair." This is an open question. *See infra* part I.C (discussing exclusivity of the New York Convention's enumeration of defenses against enforcement). We need not decide this question, however, because it is apparent that the admission of Hansen's testimony and the relatively late provision of the TÜV report did not render the proceedings fundamentally unfair. The appellants had ample opportunity to rebut the report and Hansen's testimony, and in fact did so with expert witnesses of their own. Any undue prejudice caused by the admission of Hansen's testimony and of the TÜV report was therefore cured sufficiently to ensure that the proceedings were not rendered fundamentally unfair by the admission of these materials.

12. In *Stein v. Reynolds Securities, Inc.,* 667 F.2d 33 (11th Cir. 1982), this court adopted as binding precedent all decisions of Unit B of the former Fifth Circuit handed down after September 30, 1981.

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The AAA's Rule 3 is a prime example. It does not require parties to provide all documents by any certain deadline; rather, it notes the importance of predictability in the proceedings and of the efficient exchange of relevant information, and provides only that "the AAA will make arrangements for the exchange of documentary evidence." There is thus no notice requirement in Rule 3 that MAN GHH could have violated; instead, arbitrators are left wide discretion to require the exchange of evidence, and to admit or exclude evidence, how and when they see fit. This is the rule to which the parties agreed, and we therefore cannot say that the relatively late provision of the TÜV report, and its admission by the panel, constituted a failure of the panel to adhere to the parties' agreement.[13]

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13. Respondents also argue that the admission of the TÜV report at a relatively late date violated the panel's own prehearing order. That order provided that

> [e]ach side shall submit its expert witnesses' reports, witness depositions, or excerpts, to be relied upon, and expert witness summaries/affidavits, which shall include the experts' backgrounds and history, in quadruplicate, to the Association, for transmittal to the Arbitrators, by June 12, 1992.

The admission of such documents after June 12, 1992, in contravention of the panel's order, might or might not violate the agreement of the parties. We need not reach that question, however, because the TÜV report was an exhibit, not an "expert witness[ ]' report[ ], witness deposition[ ] . . . excerpt[ ] . . . expert witness summar[y,][or] affidavit[ ]." Its production was therefore not required by the prehearing order, and that order was not violated by its late production.

Appendix A

B.

The appellants also argue that the award should be vacated on the ground that the arbitration panel improperly heard testimony from Hansen, a piping expert who was retained by appellant IRI to inspect the tail gas expander casing onsite at the Tampa plant after the first wreck and who was directly involved in the redesign of the expander casing before the second wreck. The arbitration panel called Hansen to testify *sua sponte*, after the appellants objected to MAN GHH's attempt to call him.

The appellants assert that "[f]ederal and Florida cases uniformly prohibit 'side-switching,' " that is, testimony against a party's interest by an expert witness formerly retained by that party.[14] Such testimony, they argue, violates "the well-established public policy protecting . . . fundamental principles of fairness and professional conduct." The appellants cite no rule of procedure or of evidence, and not a single case,

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14. As an initial matter, we doubt whether Hansen was in fact an "expert witness" for IRI, and not merely a professional consultant who in this case happened to be a fact witness. Hansen never had an exclusivity or confidentiality agreement with IRI and was never asked to serve as an expert witness in the litigation in district court. These facts alone suffice to distinguish the instant case from the Middle District of Florida's holding in *Rentclub, Inc. v. Transamerica Rental Fin. Corp.*, 811 F.Supp. 651 (M.D. Fla. 1992), upon which the appellants rely. Most important, however, Hansen directly observed the redesign and reconstruction of the expander after the first wreck, and consulted with the parties during that process; in this regard his status in the arbitration proceeding was much the same as that of a consulting physician in a medical malpractice case. Nevertheless, we assume *arguendo* that Hansen's consulting work for IRI qualifies him as IRI's "expert witness" for purposes of this discussion.

establishing the purported "rule against side-switching." Rather, the appellants cite cases prohibiting attorneys from, or disqualifying attorneys for, contacting counterparties' experts in violation of: 1) Fed. R. Civ. P. 26,[15] *see Durflinger v. Artiles*, 727 F.2d 888 (10th Cir. 1984); 2) attorney-client privilege, *see Rentclub, Inc. v. Transamerica Rental Fin. Corp.*, 811 F.Supp. 651 (M.D. Fla. 1992); or 3) the confidentiality of work product or litigation strategy, *see MMR/Wallace Power & Indus., Inc. v. Thames Assocs.*, 764 F.Supp. 712 (D. Conn. 1991); *Geralnes B.V. v. City of Greenwood Village*, 609 F.Supp. 191 (D. Colo. 1985). The effect of these rules, taken together, is that parties will rarely be able to avail themselves of the services of the other side's expert witnesses — but that is merely the effect of these rules and not a rule unto itself. In the absence of any precedent, we decline to recognize any blanket rule or policy against "side-switching."

Moreover, none of the concerns in the cases cited by respondents are implicated by the arbitration panel's admission of Hansen's testimony. Rule 26 does not independently apply to arbitration proceedings, and attorney-client privilege is not a concern because there is no allegation that Hansen divulged

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15. Rule 26(b)(4)(B) provides:

> A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

any information properly protected by the privilege. Concerns about the confidentiality of work product and litigation strategy are not implicated because Hansen was called by the panel, not by MAN GHH, and because his testimony before the panel neither relied upon any confidential work product of IRI's attorneys nor included any information about the respondents' litigation strategy.

Finally, even if such concerns were implicated by the admission of Hansen's testimony, we could not consider vacatur of the district court's order confirming the award unless that admission fell within one of the New York Convention's seven grounds for refusal to enforce an award. *See M & C Corp. v. Erwin Behr GmbH & Co., KG,* 87 F.3d 844, 851 (6th Cir. 1996) ("[T]he Convention lists the exclusive grounds justifying refusal to recognize an [international] arbitral award."). Even if the purported "rule against side-switching" did exist, for instance, it would not control arbitration proceedings unless the parties agreed to be controlled by it. *See Szuts v. Dean Witter Reynolds, Inc.,* 931 F.2d 830, 831 (11th Cir. 1991) (noting that power and authority of arbitrator at arbitration proceeding is dependent upon the provisions of the arbitration agreement under which he was appointed). Nor have the appellants established that the admission of Hansen's testimony was a violation of public policy of the sort required to sustain a defense under article V(b)(2) of the New York Convention. We have held that domestic arbitral awards are unenforceable on grounds that they are violative of public policy only when the award violates some "explicit public policy" that is "well-defined and dominant . . . [and is] ascertained 'by reference to the laws and legal precedents and not from general consideration of supposed public interests.' " *Drummond Coal Co. v. United Mine Workers, District 20,* 748 F.2d 1495, 1499 (11th Cir. 1984)

(quoting *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, 766, 103 S.Ct. 217, 2183, 76 L.Ed.2d 298 (1983)). We believe that rule applies with equal force in the context of international arbitral awards. *See Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974) (holding that "the Convention's public policy defense should be construed narrowly"). The appellants cite no laws or precedents in support of their invocation of "the well-established public policy protecting . . . fundamental principles of fairness and professional conduct." We therefore hold that the appellants have not established a violation of public policy sufficiently to sustain a defense under article V(b)(2) of the New York Convention.

C.

Finally, the appellants also argue that the arbitral award should be vacated on the ground that it is "arbitrary and capricious." *See, e.g., Ainsworth v. Skurnick*, 960 F.2d 939, 941 (11th Cir. 1992), *cert. denied*, 507 U.S. 915, 113 S.Ct. 1269, 122 L.Ed.2d 665 (1993). We reject this argument as well. Under the law of this circuit, domestic arbitral awards may be vacated for six different reasons; four are enumerated by the FAA and two are non-statutory defenses against enforcement, derived by the courts from the statutory list. *See Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1412 (11th Cir. 1990). The two non-statutory defenses against enforcement of a domestic award are 1) that the award is "arbitrary and capricious"[16] and 2) that enforcement of the award would be

16. A domestic arbitral award may be vacated as "arbitrary and capricious" if it "exhibits a wholesale departure from the law [or] if the (Cont'd)

contrary to public policy. *See Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1458 (11th Cir. 1997).

As discussed *supra*, the seven defenses against enforcement of an international arbitral award that are enumerated in the New York Convention include a public policy defense. The Convention does not, however, include a defense against enforcement of an award on the ground that the award is "arbitrary and capricious." The omission is decisive. Section 207 of Chapter 2 of the FAA explicitly requires that a federal court "shall confirm [an international arbitral] award unless it finds one of the grounds for refusal or deferral of . . . enforcement of the award specified in the [New York] Convention." 9 U.S.C. § 207 (1997 supp.). The Convention itself provides that "enforcement of [an] award may be refused, at the request of the party against whom it is invoked, *only if* that party furnishes . . . proof that" one of the enumerated defenses is applicable. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature June 10, 1958, 21 U.S.T. 2517, 2520, T.I.A.S. No. 6997, 330 U.N.T.S. 3 (*reprinted in* 9 U.S.C.A. § 201 note (West supp. 1997)) (emphasis added). In short, the Convention's enumeration of defenses is exclusive. *See Yusuf Ahmed Alghanim & Sons*, 126 F.3d at 20 (holding that "the grounds for relief enumerated in Article V of the Convention are the only grounds available for setting aside an arbitral award"); *M & C Corp. v. Erwin Behr*, 87 F.3d 844, 851 (6th Cir. 1996) (same). We therefore hold that no defense against enforcement of an international arbitral award under Chapter 2 of the FAA

(Cont'd)

reasoning is so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling." *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 781 (11th Cir. 1993).

is available on the ground that the award is "arbitrary and capricious," or on any other grounds not specified by the Convention. The appellants' attempt to invoke such a defense thus fails.

We therefore decline to vacate the arbitral award granted to MAN GHH by the Tampa panel. Because we affirm the award, we also decline to vacate the derivative awards of costs and conversion rate compensation.

On cross-appeal, MAN GHH complains of the district court's refusal to award to MAN GHH post-arbitral-award, prejudgment interest. MAN GHH moved the court to enter judgment on the arbitral award and to grant prejudgment interest from the date the last arbitral award was made through the date of the Court's entry of the amended final judgment. The court entered judgment on the award but declined to award such interest. The court held that its jurisdiction was grounded in diversity, and that state law therefore would control the award of prejudgment interest. The court then concluded that Florida law does not authorize the granting of post-arbitral-award, prejudgment interest. Because we hold that the district court held federal question jurisdiction over the case pursuant to Chapter 2 of the FAA, see part I, *supra,* and that federal law allows awards of post-arbitral-award, prejudgment interest, we remand for a determination whether, in the court's discretion, the circumstances of the instant case warrant such an award.

Unlike most other countries, the United States has no federal statute governing awards of prejudgment interest on international arbitral awards. *See* John Y. Gotanda, "Awarding Interest in International Arbitration," 90 *Am. J. Int'l L.* 40, 45 (1996). Instead, awards of prejudgment interest are equitable

remedies, to be awarded or not awarded in the district court's sound discretion. *See Osterneck v. E.T. Barwick Ind., Inc.*, 825 F.2d 1521, 1536 (11th Cir. 1987); *Waterside Ocean Navigation Co. v. International Navigation Ltd.*, 737 F.2d 150, 153 (2d Cir. 1984). Under the law of this circuit, "[p]re-judgment interest is not a penalty, but compensation to the plaintiff for the use of funds that were rightfully his," *see Insurance Co. of N. Am. v. M/V Ocean Lynx*, 901 F.2d 934, 942 (11th Cir. 1990), and absent any reason to the contrary, it should normally be awarded when damages have been liquidated by an international arbitral award. *See Waterside Ocean Navigation*, 737 F.2d at 153-54 ("Absent persuasive reasons to the contrary, we do not see why pre-judgment interest should not be available in actions brought under the [New York] Convention."); *see also Fort Hill Builders, Inc. v. National Grange Mut. Ins. Co.*, 866 F.2d 11, 14 (1st Cir. 1989) (holding that, under either federal or Rhode Island law, post-award, prejudgment interest should be awarded on domestic arbitral award); *Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59 (3d Cir. 1986) (holding that confirmed domestic arbitral award bears interest from date of award, not from date of judgment confirming award).[17]

In the absence of a controlling statute, federal courts' choice of a rate at which to determine the amount of prejudgment interest to be awarded is also a matter for their discretion. That choice is usually guided by principles of reasonableness and fairness, by relevant state law, and by the relevant fifty-two week United States Treasury bond rate, which

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17. We note that international arbitrators often award post-arbitral-award interest. *See, e.g., Bergesen v. Joseph Muller Corp.*, 548 F.Supp. 650, 651 (S.D.N.Y. 1982); *Laminoirs-Trefileries-Cableries De Lens, S.A. v. Southwire Co.*, 484 F.Supp. 1063, 1069 (N.D. Ga. 1980).

is the rate that federal courts must use in awarding *post*-judgment interest. *See* 28 U.S.C. § 1961; Gotanda, *supra,* at 45 and n. 63 (citing cases).

Because the district court below held federal subject-matter jurisdiction under 9 U.S.C. § 203, the decision whether to grant prejudgment interest was a matter for the court's discretion and was not controlled by state law. The district court declined to award post-arbitral-award, prejudgment interest on the grounds that it held only diversity jurisdiction, that state law therefore controlled, and that Florida law prohibited such an award under the circumstances. Because we hold that federal law controls both the entitlement to and the rate of post-arbitral award, prejudgment interest, we find that the district court failed to exercise its discretion.[18] We therefore remand for a determination whether, under the circumstances, MAN GHH is entitled to post-arbitral-award, prejudgment interest.

V.

In a separate appeal, MAN GHH's counsel challenge the district court's imposition of Rule 11 sanctions.[19] The decision

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18. We also note that, while the district court may choose to be guided by Florida law in determining whether to grant post-award, prejudgment interest, it appears to have misread *Pharmacy Management Servs., Inc. v. Perschon,* 622 So.2d 75 (Fla. 2d Dist. Ct. App. 1993). That case held that a court may not grant pre-*award* interest on a final arbitral award that states that it is in full settlement of all claims. *Perschon* did not hold that a court may not grant *post*-award, pre-*judgment* interest on such an award.

19. Rule 11 provides in relevant part:

(Cont'd)

Appendix A

(Cont'd)

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances —

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

Fed. R. Civ. P. 11.

whether to impose Rule 11 sanctions is left to the district court's sound discretion. *See Worldwide Primates, Inc. v. McGreal,* 87 F.3d 1252, 1254 (11th Cir. 1996). An abuse of discretion occurs when the court makes a clear error of law or fact in determining whether to impose sanctions. *See Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 405, 110 S.Ct. 2447, 2461, 110 L.Ed.2d 359 (1990).

Sanctions may be imposed under Rule 11 for filings that are presented to the court "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Fed. R. Civ. P. 11(b)(1); *see also Pelletier v. Zweifel,* 921 F.2d 1465, 1514 (11th Cir. 1991). "Improper purpose may be shown by excessive persistence in pursuing a claim or defense in the face of repeated adverse rulings. . . . Rule 11 is intended to reduce frivolous claims and to deter costly meritless maneuvers, thereby eliminating delay, and reducing the cost of litigation." *Pierce v. Commercial Warehouse,* 142 F.R.D. 687, 690-91 (M.D. Fla. 1992). In order for sanctions to be appropriate, however, the filing for which sanctions are imposed must be frivolous, that is, it must enjoy no factual and legal support in the record. *See Davis v. Carl,* 906 F.2d 533, 538 (11th Cir. 1990) ("Rule 11 is intended to deter claims with *no* factual or legal basis at all; creative claims, coupled even with ambiguous or inconsequential facts, may merit dismissal, but not punishment." (emphasis in original)). In order for sanctions to be imposed for excessive relitigation of an issue already decided by the court, the disputed issue must have been clearly decided by the court's earlier orders, and counsel's relitigation of the issue must clearly offer no meritorious new arguments. *See, e.g., Mariani v. Doctors Assoc's, Inc.,* 983 F.2d 5, 8 (1st Cir. 1993) (imposing sanctions for "virtually *verbatim*" reargumentation of an issue — dismissal of the action — clearly already decided by the court) (emphasis in original).

Appendix A

The facts underlying the instant sanctions order are as follows. MAN GHH provided the expander and various services to Barnard and Burk pursuant to one contract for the design, manufacture, and sale of the expander ("the design contract") and one service contract; MAN GHH also provided spare parts and services to Nitram under two separate service contracts.[20] The transactions between MAN GHH, Nitram, and Barnard and Burk that were the subject of the arbitral proceeding thus arose out of four separate contracts. In the district court, MAN GHH first moved for arbitration of the third-party claims asserted against it by Barnard and Burk, and later, after Nitram and IRI had filed tort and breach-of-warranty claims against MAN GHH, moved for arbitration of those claims as well.[21] At the time that MAN GHH moved for arbitration of Nitram's and IRI's claims against it, only one contract—the design contract—had been entered into the record below. Nitram and IRI were not parties to this contract and argued that they therefore ought

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20. Specifically, MAN GHH 1) provided the expander to Barnard and Burk Group under the design contract; 2) provided engineering services to Barnard and Burk Engineers and Constructors under a second contract; 3) provided engineering services to Nitram under a third contract; and 4) provided a spare rotor to Nitram under a fourth contract. We refer to these latter three contracts as "the service contracts" for brevity's sake.

21. As the district court noted, Nitram's and IRI's claims against MAN GHH were arbitrable even though they were cast as tort and breach-of-warranty claims, rather than contract claims. *See Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 846 (2d Cir. 1987) (holding that, in determining whether particular claim falls within scope of arbitration agreement, court focuses on factual allegations in complaint rather than legal causes of action asserted, and if allegations underlying claims "touch matters" covered by parties' arbitration agreement, then claims must be arbitrated, whatever legal labels are attached to them).

not to be ordered to submit their claims to the arbitrators. MAN GHH contended—and the district court concluded—that all of the claims involved in the case at that time were so closely related that they all should be submitted to the Tampa panel. The district court referred to the arbitration clause in the design contract and ordered arbitration, in Tampa, of Nitram's and IRI's claims against MAN GHH, along with those of Barnard and Burk.[22]

Before the Tampa arbitration began, MAN GHH returned to the district court and moved for 1) a preliminary injunction limiting the scope of the Tampa arbitration and, in the alternative, 2) an order compelling arbitration, in Europe, of some claims that Nitram and Barnard and Burk intended to raise in the Tampa arbitral proceeding.[23] MAN GHH argued that Barnard and Burk and Nitram were raising new contract claims before the Tampa panel, claims arising from the three

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22. In 1990, while the arbitral proceedings were still pending, the district judge who had presided over the case, the Hon. George C. Carr, passed away. All subsequent district court proceedings referred to in this opinion were presided over by the Hon. Elizabeth A. Kovachevich.

23. This motion was legally proper; the district court had the power to enjoin the arbitration of the newly-asserted contract claims. *See Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 985 F.2d 1067, 1068-69 (11th Cir. 1993) (holding that federal courts have power to enjoin arbitration of state common law claims in cases in federal court); *see also Societe Generale de Surveillance, S.A. v. Raytheon European Management and Sys. Co.*, 643 F.2d 863, 868 (1st Cir. 1981) ("To allow a federal court to enjoin an arbitration proceeding which is *not* called for by the contract interferes with neither the letter nor the spirit of this law. Rather, to enjoin a party from arbitrating where an agreement to arbitrate is absent is the concomitant of the power to compel arbitration where it is present.") (emphasis in original).

service contracts not referred to by the district court in its earlier orders compelling arbitration. These new claims, MAN GHH argued, were due to be arbitrated in Paris and Zurich pursuant to arbitration clauses in the service contracts. Barnard and Burk and Nitram contended that they had made clear to the court that claims under those contracts might well arise during the arbitral proceedings, and that the court, in anticipation, included those potential claims in its orders compelling arbitration in Tampa. The district court agreed, and held that its earlier orders compelling arbitration had considered the venue of claims arising under the three service contracts and had mandated that arbitration of those claims proceed in Tampa.[24] The court therefore denied the preliminary injunction.

Barnard and Burk then moved for sanctions pursuant to Rule 11, arguing that MAN GHH's motion for preliminary injunction constituted an improper attempt to relitigate an issue—the venue of the arbitral proceeding—already decided by the court. The court agreed, and awarded sanctions. *See Nitram, Inc. v. Industrial Risk Insurers,* 149 F.R.D. 662 (M.D.

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24. The district court's order denying the preliminary injunction merely stated that a preliminary injunction would be "inappropriate" under the facts of the case; it also incorporated by reference, however, the opposition to the motion for preliminary injunction filed by Nitram, IRI, and Barnard and Burk. That opposition argued that the earlier order compelling arbitration of Nitram's and IRI's claims against MAN GHH included the claims arising under the three service contracts. In its later order imposing sanctions, the district court specifically verified its intention to incorporate that particular argument into the court's denial of the motion for preliminary injunction. We note in this context that the judge who reviewed the earlier orders compelling arbitration and, we believe, misread them, was not the same judge who entered those orders. *See supra* note 22.

Fla. 1993). Enforcement of the sanctions order was stayed pending this appeal.

MAN GHH's counsel now argue that the district court clearly erred in holding that there was no support in the record for MAN GHH's assertion that the claims asserted by Nitram and Barnard and Burk under the three service contracts were not covered by the district court's earlier orders compelling arbitration, and that those claims were due to be arbitrated in Europe. Thus, counsel argue, the district court abused its discretion, and the sanctions order should be vacated. We agree.

The initial suit brought by Nitram against IRI and Barnard and Burk was a suit in contract, based on the contract between Nitram and Barnard and Burk for the installation of the expander. Barnard and Burk's third-party complaint against MAN GHH sought indemnification on the basis of the design contract between MAN GHH and Barnard and Burk. Furthermore, the court's order compelling arbitration of Barnard and Burk's third-party claims against MAN GHH was wholly pursuant to the design contract; the order compelling arbitration of those claims mentioned and cited only the arbitration clause contained in the design contract. Indeed, the three service contracts had never even been entered into the record at the time that the court entered its orders compelling arbitration. When the court later ordered arbitration of Nitram's and IRI's tort and breach-of-warranty claims against MAN GHH, it did so on the ground that those claims were intertwined with and grounded in the design contract between MAN GHH and Barnard and Burk, and on the ground that Nitram and IRI were third-party beneficiaries of that contract. In short, the district court's orders compelling arbitration committed to arbitration only the arbitrable claims that were before the court at the time:

Barnard and Burk's third-party claims against MAN GHH and the tort and breach-of-warranty claims brought by Nitram and IRI against MAN GHH.

The court could not have done more. There had been no contract claims brought on the three service contracts; there were thus no arbitration clauses before the court mandating arbitration of any such claims, and the court therefore had no jurisdiction to compel arbitration of those claims. Chapter 2 of the FAA, like Chapter 1, "does not require parties to arbitrate when they have not agreed to do so, . . . nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement." *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 1255, 103 L.Ed.2d 488 (1989) (citations omitted). "It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Id.* Like other contracts, an agreement to arbitrate disputes may not be enforced by the courts until the agreement has been brought before the court by a proper pleading. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n. 12, 87 S.Ct. 1801, 1806 n. 12, 18 L.Ed.2d 1270 (1967) (stating that the FAA was designed "to make arbitration agreements as enforceable as other contracts, but not more so"). In the instant case, the parties had placed contract claims arising from the three service contracts under the purview of the arbitration clauses in those contracts[25]—not under the arbitration clause in the design

25. Specifically, claims arising under MAN GHH's contract with Barnard and Burk Engineers and Constructors (*see supra* note 20) were due to be arbitrated in Zurich, and claims arising under MAN GHH's spare rotor contract with Nitram were due to be arbitrated in Paris. MAN

(Cont'd)

contract—and no contract claims arising from the service contracts had been pled to the district court. The court therefore could not have ordered arbitration of those claims.[26]

Therefore, when the arbitrators agreed to hear claims arising out of the three collateral service contracts, they did so outside of their charge by the district court.[27] Consequently, MAN GHH's counsel's motion for a preliminary injunction limiting the scope of the Tampa arbitration and for an order moving arbitration of these claims to Europe clearly enjoyed support in the record. The district court's determination that the motion did not enjoy any such support was therefore clearly erroneous, and its imposition of sanctions was an abuse of discretion. Accordingly, we reverse the order imposing Rule 11 sanctions upon MAN GHH's counsel.

(Cont'd)
GHH's contract with Nitram for engineering services contained no arbitration clause, and the district court therefore very likely could not properly have compelled arbitration of claims arising thereunder at all. Consequently, it certainly may not be said that claims arising under these contracts were clearly due to be arbitrated in Tampa.

26. As noted *supra*, we conclude that the court's orders compelling arbitration did not purport to commit to arbitration any contract claims arising out of the three service contracts.

27. It also seems that they did so outside of the agreement of the parties to the arbitration, since MAN GHH did not agree to have those claims arbitrated in Tampa. As noted *supra*, however, MAN GHH prevailed on those claims at arbitration and therefore did not make this argument to the district court, and does not make this argument on appeal. The appellants do not attempt to make this argument either. We therefore deem the argument waived.

Appendix A

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's denial of the motion to vacate the arbitral award, but VACATE the district court's denial of prejudgment interest and REMAND the case for resolution of that issue. We also REVERSE the district court's imposition of Rule 11 sanctions against MAN GHH's counsel. SO ORDERED.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED MAY 22, 1998

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 94-2982

District Court No. 85-1770-CIV

INDUSTRIAL RISK INSURERS, BARNARD & BURK GROUP, INC., BARNARD AND BURK ENGINEERS AND CONSTRUCTORS, INC., ISI, INC., AMERICAN HOME ASSURANCE CO.,

Defendants-Third-Party-Plaintiffs-Appellants,

versus

M.A.N. GUTEHOFFNUNGSHUTTE GmbH,

Third-Party-Defendant-Appellee-Cross-Appellant.

No. 94-2530

District Court No. 85-1770-CIV

HOLLAND & KNIGHT, MARK E. GRANTHAM

Appellants,

versus

Appendix B

INDUSTRIAL RISK INSURERS, BARNARD & BURK GROUP, INC., BARNARD AND BURK ENGINEERS AND CONSTRUCTORS, INC., ISI, INC., AMERICAN HOME ASSURANCE CO.,

Defendants-Third-Party-Plaintiffs-Appellees.

Before TJOFLAT and EDMONDSON, Circuit Judges, and NANGLE*, Senior District Judge.

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and were argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjduged by this Court that the order of the said District Court appealed from in appeal No. 94-2982 is hereby AFFIRMED in part and VACATED in part; and that this cause be and the same is hereby REMANDED to said District Court for with instructions in accordance with the opinion of this Court; that the order of the said District Court appealed from imposing Rule 11 Sanctions in appeal No. 94-2530 is hereby REVERSED in accordance with the opinion of this Court;

It is further ordered that defendants-third-party-plaintiffs-appellants pay to third-party-defendant-appellee-cross-appellant, the costs on appeal in No. 94-2982; and that defendants-third-party-plaintiffs-appellees pay to appellant, the costs on appeal to be taxed by the Clerk of this Court.

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* Honorable John F. Nangle, Senior U.S. District Judge for the Eastern District of Missiouri, sitting by designation.

Appendix B

Entered: May 22, 1998
For the Court: Thomas K. Kahn, Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: JUN 25, 1998

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DIVISION OF FLORIDA, TAMPA DIVISION DATED MARCH 23, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 85-1770-CIV-T-17

NITRAM, INC.,

Plaintiff,

vs.

INDUSTRIAL RISK INSURERS et al.,

Defendants/Third-Party Plaintiffs,

vs.

MAN GUTEHOFFNUNGSHUTTE GmbH, et al.,

Third-Party Defendants.

ORDER ON MOTION TO VACATE AND MOTION TO CONFIRM

This cause is before the Court on Barnard and Burk Engineers & Constructors, Inc.'s, ("BBEC"), as well as Barnard and Burk Group, Inc. ("Barnard and Burk"), ISI, Nitram, Inc., ("Nitram"), and Industrial Risk Insurers ("IRI"), (herein collectively "Respondents"), Motion to Vacate Arbitrators' Award (Docket #558) filed on August 6, 1993; response filed

thereto (Docket #564 & 569) on August 18, 1993; Motion to vacate the Arbitrator's Costs Award (Docket #572) filed October 13, 1993; response filed thereto on October 29, 1993 (Docket #580); and MAN GUTEHOFFNUNGSHUTTE GmbH's (herein MAN GHH) Petition to Confirm Final Arbitral Awards (Docket #568), filed on September 23, 1993.

FACTUAL BACKGROUND

Arbitration was compelled between MAN GHH and Respondents pursuant to an arbitration provision in the parties' subcontract agreement. The parties arbitrated their claims before a three member panel in a consolidated arbitration. The claim arose out of the supply, by MAN GHH, of a tail gas expander for a nitric acid plant operated in Tampa, Florida by Nitram.

The facts as set out in the Arbitrator's Award are as follows: Respondents were retained by Nitram Inc., as project engineers & contractors, to assist in the modification of Nitram's nitric acid plant. Part of the work performed by Respondents was the installation of a tail gas expander, the purpose of which was to generate energy from waste gas. MAN GHH delivered the expander. The Respondents were responsible for the piping required to put the expander into service. On January 16, 1985, during start-up procedures, moving and stationary components of the expander came in contact with each other. This caused a "wreck" of the machine, deforming its rotor, scarring its stator casing and destroying seals.

Parts of the expander were returned to Germany for repair and the piping was modified. In March of 1985, the expander, again suffered a second wreck. The machine was subsequently

rebuilt and after further piping modifications, it ran successfully.

Respondents, in addition to other allegations, primarily alleged that MAN GHH breached its contract and was negligent. Respondents also argued that the machine failed to achieve the performance criteria required of it. MAN GHH argued that it delivered a machine as required by its contract with the Respondents and that the performance requirements were met.

The main issues before the Arbitration Panel were:

1. What caused the two "wrecks."

2. Was MAN GHH in breach of contract and negligent.

3. To what, if any money, would either party be entitled.

4. Who would be responsible for costs of the arbitration.

After hearing expert testimony on both sides, the Arbitration Panel concluded that both the "wrecks" were caused by the piping and not the expander. Additionally, the Panel found that MAN GHH was not negligent, nor in breach of contract.

Further, the Panel awarded MAN GHH 218,387.96 in Deutschemark which was converted into a total of $80,658.56. U.S. dollars. The Panel ordered Respondents to pay MAN GHH the sum awarded and held that Respondent was not entitled to any money. The Panel also held that MAN GHH should receive only the costs of arbitration, excluding attorneys fees, the filing and postponement fees it paid to the American Arbitration

Association (herein "AAA"), the costs of interpreters and the costs of Mr. Hansen, and mediation costs. The Panel awarded $299,772.05 in costs to MAN GHH to be paid by Respondents and the Insurers.

Subsequent to the Arbitration Panel's Award, Respondents filed their Motions to Vacate and MAN GHH filed a Motion To Confirm the Arbitral Award.

ISSUES

Respondents argue that the Arbitral Award should be vacated on the following grounds:

1. The use of expert witness, Hansen, who was originally retained by Respondents, and admission of the "last minute report," denied them a fundamentally fair hearing, and constituted substantial prejudice to Respondent's rights and violated 9 U.S.C. § 10(a)(1) and (a)(3);

2. The Panel failed to conform the hearing to the arbitration agreement, made and amended by the parties through the specific agreement, in violation of the AAA's Panel's Orders concerning ex parte communications with Hansen and deadlines for disclosure of expert reports and thereby denied them a fundamentally fair hearing and prejudiced the rights of Respondents in violation of 9 U.S.C. § 10(a)(3) and (a)(4);

3. Admission of the Hansen evidence violated public policy;

4. The Arbitration Award was irrational, arbitrary, and capricious with no basis in evidence and in contradiction of

undisputed facts, failed to provide a reasoned award on principle issues as agreed by the parties, and failed to determine the issues submitted contrary to 9 U.S.C. § 10(a)(4).

Additionally, Respondents argue in their Motion to Vacate the Arbitrators' Costs Award that the Panel's cost award is arbitrary and capricious.

STANDARD OF REVIEW

Respondents base their Motion to Vacate the Arbitration Award on 9 U.S.C. § 10(a)(1), (3) and (4). The Statute reads in pertinent part:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make
>
> an order vacating the award upon the application of any party to the arbitration —
>
> (1) Where the award was procured by corruption, fraud, or undue means . . .
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Although District Courts have discretion to vacate arbitration awards, this authority is not without limits. Great deference is afforded to these types of awards. *O.R. Securities, Inc. v. Professional Planning Association*, 857 F.2d 742, 746 (11th Cir. 1988), citing *Wilko v. Swan*, 74 S.Ct. 182 (1953).

OPINION

1. *Whether Hansen's testimony unfairly Prejudiced Respondents' case* — Respondents state that they originally retained Hansen as an expert. Respondents therefore, argue that they never consented to counsel for MAN GHH contacting Hansen nor their use of his expert testimony in their case. Further, Respondents argue that because of Hansen's history of "sideswitching," the Panel, should not have called nor allowed Hansen to testify, as this unfairly prejudiced their case.

The issue over whether Hansen should have been allowed to testify was vigorously debated by the parties. The Arbitration Panel, over Respondents contentions, decided to call Hansen as their own witness. The Panel found that Hansen's testimony was relevant to the issues in the case and indeed, the Panel relied on Hansen's testimony, along with the other expert testimony, in making its ruling. Clearly, Hansen's testimony was damaging to Respondent's case.

Respondents are in effect, asking this Court to review the Arbitrator's Award *de novo*. The level of scrutiny given to an

Arbitrator's award is not that intrusive and moreover, because such awards are given greater deference, this Court shall not make such a review.

It is well settled that Federal courts give great deference to an arbitrator's decision to control the order, procedure and presentation of evidence. While it is true that Hansen testified that he believed the piping caused the machine failure and that this may have been a change from his original position, this Court finds that Respondents were not unduly prejudiced by this testimony. The Panel's written "Hansen Ruling" was published on February 15, 1993 and Hansen testified on March 26, and 27, 1993. There was opportunity for cross examination, and, in fact, Respondents conducted cross examination. Because Respondents had over one month to prepare for Hansen's appearance and because there was ample time for cross examination, this Court finds that Panel's decision to call Hansen as their own witness and allow his testimony was not unreasonable. Moreover, because Hansen's testimony was not the only evidence considered by the Panel, it cannot be considered so materially prejudicial as to move this Court to grant the Motion to Vacate.

2. *Whether Admission of the evidence violated the rules of the Arbitration* — Respondents argue that the admission of Hansen's testimony, on the report which pointed to the piping as the cause of the wrecks, was in violation of a prehearing order that all expert reports and significant documents be exchanged before October 31, 1992. Respondents allege that the report was not provided to them until January 8, 1993, the Friday before the hearings began. Additionally, the Respondents argue that admission of this evidence was unfairly prejudicial to their case.

The fact that the report, which indicated the piping as the cause of the "wreck," was given to Respondents only days before the commencement of the arbitration is irrelevant because the report was first given to Respondents on January 8, 1992, and Hansen did not testify that this report was the basis for his new opinion until March 26, and 27. Again, Respondents had ample opportunity to prepare for and rebut such testimony. The record reflects that there was cross examination and, therefore, opportunity for impeachment. This would have been an effective method for Respondents to use to discredit Hansen's damaging testimony. Further, Respondents called their own experts which the Panel heard and carefully weighed. Respondents only "muddy" the waters when they assert further, that this report was hearsay. Pursuant to the AAA's Arbitration Rules, arbitrators are not bound by traditional rules of evidence and possess the authority to receive evidence beyond the confines of such rules.

The admission of the alleged "last minute" report by the Panel over Respondent's objection, did not rise to the level of "misbehavior" pursuant to § 10(a)(3) as argued by Respondent's. Nor did the Panel's admission of the report constitute a departure from their authority under the Federal Arbitration rules.

3. *Whether the Panel's award or Hansen's testimony is violative of Public Policy* — Respondents argue that an arbitration award should be vacated when it is contrary to public policy, citing *Delta Airlines, Inc. v. Airline Pilots Ass'n,* 861 F.2d 665 (11th Cir, 1988), *cert. denied,* 493 U.S. 871 (1989).

It is well settled that a court will only vacate an arbitration if the award is violative of some explicit public policy.

However, this "policy" must be "well defined, dominant, and be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *United Paperworks Int'l Union v. Misco, Inc.*, 484 U.S. 291, 43 (1987).

Respondents fail to give adequate explanation as to precisely what "explicit" public policy was violated by Hansen's testimony or what policy will be violated by the Panel's award. Therefore, this Court finds that the public policy exception is inapplicable here because this Court fails to see what public policy will be offended by the award.

4. *Whether the Arbitration Award was improper* — Respondents argue that the Arbitration Award had no basis in evidence and was irrational, arbitrary, and capricious.

An arbitration award may be vacated if it is arbitrary and capricious or if enforcement of the award would be contrary to public policy. *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775 (11th Cir. 1993). However, "the onus is on the party requesting the vacatur to refute . . . every rational basis upon which the arbitrator could have relied." *Robbins v. Day*, 954 F.2d 679, 684 (11th Cir. 1992).

Awards should be vacated as arbitrary and capricious on two grounds. First, if the award exhibits a wholesale departure from the law. *Ainsworth v. Skurnick*, 960 F.2d 939, 941 (1992). Or, second, if the award is not grounded in the contract which provides for the arbitration. *U.S. Postal Service v. National Association of Letter Carriers, AFL-CIO*, 847 F.2d 775, 778 (1988). The Respondents are supported by neither ground. An Award is arbitrary and capricious only if a legal ground for the

arbitrators decision cannot be inferred from the facts of the case. *Raiford v. Merrill Lynch, Pierce, et al.*, 903 F.2d 1410, 1413 (1990). Moreover, an award may be vacated as arbitrary and capricious if the reasoning is so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling. *Safeway Stores v. American Bakery and Confectionery Workers, Local 111*, 390 F.2d 79, 82 (5th Cir. 1968). No such ground exists here.

Essentially, for this Court to vacate an arbitrator's decision, it must find that there is no basis for the Panel's decision. This Court finds that the Panel's award was not arbitrary and capricious, nor violative of any public policy. The Panel sufficiently set out the basis for its decision in its sixteen (16) page statement regarding the award. The decision was not so palpably faulty that no judge could have arrived at the same ruling. This Court can infer grounds for the Panel's award from the facts of the case. Furthermore, an arbitrator need not state the reasons for its award. *Robbins v. Day* 954 F.2d 679, 684 (11th Cir. 1992).

This Court further, finds that the Panel's award of costs was not arbitrary or capricious. The arbitrators gave a very thoughtful and careful explanation of why they awarded the particular costs in this case. Further, Respondents Motion to Vacate the Arbitrators' Conversion Rate Award was considered along with the general Motion to Vacate the Arbitrators' Award.

Respondents specifically argue that the costs awarded with reference to the expert testimony, the daily transcripts, and the 50/50 cost split of the TUV report were violative of Florida law and published guidelines.

Appendix C

Respondents challenge the costs awarded pursuant to the testimony of a one Dr. Naumann and Peterson Consulting. In reference to Dr. Naumann, the Panel reduced the amount requested by the Claimants by 40% and awarded costs after hearing assertions on both sides and reviewing the quality of the witness's expertise and testimony.

With respect to Peterson Consulting, again the Panel gave their award careful analysis. The Panel reduced the Claimant's request by 20%.

Respondents also challenge the award for costs of the daily transcripts. The Panel pointed out that both parties used the daily transcripts and that arbitrators have the discretion to tax the cost of such transcripts when they serve a useful purpose.

Respondents also argue the 50/50 split of the TUV report was arbitrary and capricious. The TUV report was introduced and considered by the Panel, however, because of the circumstances of its introduction, the Panel reduced the amount claimed by 50%.

Arbitrators may grant remedy or award that it deems just and equitable and will not be reviewed *de novo* by the this Court. Judicial review of arbitration awards is extremely narrow. *O'Rear v. American Family Life Assurance Company of Columbus, Inc., et al.*, 817 F.Supp. 113, 115 (M.D. Fla. 1993).

Notwithstanding any other arguments made by Respondents not mentioned specifically in this order, the Panel's award and award for costs were not arbitrary and capricious nor were they procured by corruption, fraud or undue means pursuant to § 10(a)(1). Respondents have not established

that the arbitrators were responsible for any misconduct or that their behavior prejudiced the Respondents. Nor did the arbitrators exceed the power executed them on any matter in this case. Accordingly, it is

ORDERED that Respondent's Motion to Vacate the Arbitrator's Award, be **DENIED; ORDERED** that Respondent's Motion to Vacate the Costs Award be **DENIED;** and that MAN GHH's Motion to Confirm the Award be **GRANTED.** The Clerk be **directed** to enter judgment accordingly.

DONE and ORDERED in Chambers, in Tampa, Florida, this 23rd day of March, 1994.

s/ Elizabeth A. Kovachevich
ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:
All parties and counsel of record

APPENDIX D — AWARD OF ARBITRATORS

AMERICAN ARBITRATION ASSOCIATION

Commercial Arbitration Tribunal

In the Matter of the Arbitration between

MAN Gutehoffnungshutte GmbH as contractual successor to M.A.N. Maschinenfabrik Augsburg-Nurnberg Aktiengesellschaft

Claimant

-and-

Barnard and Burk Engineers and Constructors, Inc., Barnard and Burk Group, Inc., ISI, Inc., American Home Assurance Company, Nitram, Inc., and Industrial Risk Insurers

Respondents

Case No. 33 V199 0009 87
(formerly 13 T199 0367 87, 13 T199 0537 88 and 13 T199 0594 88)

AWARD OF ARBITRATORS

We, the undersigned Arbitrators, having been designated in accordance with the arbitration agreements entered into by the above-named parties and having been duly sworn and having duly heard the proofs and allegations of the parties, AWARD as follows:

This consolidated arbitration arises out of the supply by the Claimant of a tail gas expander for a nitric acid plant operated

in Tampa, Florida by one of the Respondents, Nitram, Inc. ("Nitram"). By an earlier determination, the proceedings against Nitram were disposed of. It no longer is a Respondent. The Barnard & Burk Respondents and ISI hereafter are referred to collectively as the "Respondent." The other Respondents hereinafter are referred to collectively as the "Insurers."

Nitram decided to modify its nitric acid plant. The Respondent was retained by Nitram as project engineers and contractors. Part of the work included the installation of a tail gas expander, the purpose of which was to generate energy from waste gas. A bidding process for suppliers of the expander took place in the autumn of 1983. The Claimant was selected. A purchase order dated January 12, 1984, was issued by the Respondent and accepted by the Claimant on April 13, 1984. The Respondent Issued Change Order No. 1, dated March 30, 1984, which also was accepted on April 13, 1984, by the Claimant. The Purchase Order stated:

> The Expander, Services, and Drawings & Data shall be furnished in accordance with Barnard & Burk's . . . requisition No. 4139-EQ12, Issue 1, Pages 1-4; the conditions listed herein; and M.A.N.-GHH proposal No. M83/10023A with revisions dated Dec. 8, 1983 and Dec. 20, 1983, and Revision dated Jan. 10, 1984 except when in conflict with BBECI requisition No. 4139-EQ12.

The M.A.N.-GHH proposal contained an arbitration clause which stated, in part:

> Differences of opinion as to the interpretation or performance of the contract shall be finally settled without recourse to formal legal proceedings . . .

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This proposal was modified in the Purchase Order as follows:

> Arbitration and applicable law changed to American Arbitration Association in accordance with Florida law.

The expander was delivered by the Claimant which also entered into separate contracts with Nitram with respect to spare parts, and commissioning. The Respondent was responsible for the piping required to put the expander into service. On January 16, 1985, during start-up procedures, moving and stationary components of the expander came in contact with each other. This caused a "wreck" of the machine, deforming its rotor, scarring its stator casing and destroying seals.

Parts of the expander were returned to Germany for repair. The piping was modified. On March 24, 1985, again during start-up, the expander, consisting of a spare rotor and a repaired stator blade carrier, suffered a second wreck. The machine then was rebuilt with the repaired main rotor and, after further piping modifications, it ran successfully on June 12, 1985.

On November 8, 1985, Nitram commenced proceedings in the Circuit Court of Hillsborough County, Florida — which subsequently were moved to the United States District Court, Middle District of Florida, Tampa Division — against a number of parties who had been involved in the project and their insurers. Steps were taken to involve the Claimant in the court proceedings. It initiated arbitration through the American Arbitration Association and obtained court orders staying the litigation against it pending the results of arbitration.

The Claimant sought payment of unpaid invoices in connection with the project. The Respondent and the Insurers defended

and cross-claimed taking the position that the January and March 1985 wrecks were caused by the Claimant. The Claimant says that these events were caused by the faulty piping of the Respondent. In summary, the Claimant seeks to recover 116,163.81 DM plus interest thereon at 1% per month from January 1, 1986 to May 1, 1993 in the amount of 102,224.15 DM to a total of 218,387.96 DM. The Respondent and the Insurers claim $4,894,604.00 plus interest thereon in the amount of $4,374,803.00 to a total of $9,269,407.00 as of April 1, 1993 with daily interest thereon in the amount of $1,609.00. The Respondent claims in its own right and as an assignee of the rights of others. The Insurers claim as assignees and subrogees of the rights of others.

The Respondent and the Insurers claim in tort and contract. They alleged Claimant misrepresented its ability to supply an expander as required by Nitram and that the Claimant fraudulently induced the Respondent and Nitram to agree not to undertake certain testing before the machine was delivered. With respect to the supply of the machine itself, the Respondent and the Insurers contend that the Claimant breached its contract as reflected in the Purchase Order and Change Order No. 1 and was negligent. The Respondent and the Insurers also contend that their claims can be pursued under the contracts that the Claimant entered into directly with Nitram. It also is alleged that the machine failed to achieve the performance criteria required of it.

The Claimant says that it delivered a machine as required by its contract with the Respondent and that no other contracts are before us. It contends that the performance requirements were met and that we have no jurisdiction to consider claims in fraud or pursuant to other contracts.

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In the alternative, the Claimant says that if it were at fault with respect to the January and March 1985 incidents, its liability for damages would be limited both as to quantum and type. The Respondent and the Insurers assert that the provisions in the Purchase Order and Change Order No. 1, which purport to limit damages, are not part of the contract or are inapplicable or unenforceable under Florida law which is the proper law of the contract.

A number of issues have been presented for determination.

1. Does the panel have jurisdiction to decide all of the issues which have been presented to it by the parties?

2. Are the provisions purporting to limit damages part of the contract between the Claimant and Respondent?

3. If so, is the quantum or type of damages recoverable limited?

4. If the panel has jurisdiction to consider the allegations of fraud, was there fraud in fact?

5. Did the Claimant breach the performance requirements of the contract and, if so, to what extent?

6. Was the Claimant negligent or in breach of contract in its supply of the expander?

7. What caused the January 1985 "wreck"?

8. What caused the March 1985 "wreck"?

9. To what, if any, money is the Claimant entitled?

10. To what, if any, money are the Respondent and the Insurers entitled?

11. Who is responsible for the costs of the arbitration?

The panel has determined responsibility for the costs. We retain jurisdiction to quantify those costs if the parties were unable to agree.

Jurisdiction

The scope of the panel's jurisdiction has been determined judicially. Both parties agree that this is appropriate.

> It is fundamental that, "the questions of arbitrability . . . is undeniably an issue for judicial determination."[1]
>
> There is no question but that the question of arbitrability *vel non* is for the Court.[2]

On July 22, 1987, Judge Carr stayed third party claims brought by the Respondent and others pending the results of this arbitration. In doing so, he stated at Page 2 of his Order:

---

1. Claimant's memorandum in support of its Motion for Preliminary Injunction.

2. Respondent's response to Claimant's Motion for Preliminary Injunction.

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> The gravamen of the third party complaint against GHH is that the liability of the third party plaintiffs to Nitram, if any, is strictly of a vicarious, derivative, constructive, or technical nature, and as a sole result of the active negligence, breach of contract and breach of warranty by GHH. . . . GHH is responsible to them for any sums they must pay to Nitram on account of the expander. . . . Third party plaintiffs have sought common law indemnity and contribution against GHH . . . . B & B, ISI, and American Home seek recovery from GHH under the third party complaint . . . . These same third party plaintiffs filed a cross-claim against GHH in which they seek damages from GHH for its alleged negligent failure to use reasonable care in the performance of its contractual obligations with BBEC.

On August 2, 1988, Judge Carr stayed claims brought by Nitram and IRI pending the results of this arbitration. In doing so, he stated at Page 2:

> . . . Nitram asserts claims against GHH based on breach of express and implied warranties, strict liability and negligence because of alleged defects in the expander . . . IRI asserts claims against GHH as a subrogee to all Nitram's claims.

and at Page 3:

> All of the claims asserted against GHH in this suit arise from alleged defects in its expander and from short-comings in GHH's performance under the

> contract. All of these claims fall within the scope of the arbitration clause. This is true regardless of whether they are cast in tort or contract law. It is well settled that parties cannot avoid broad language in an arbitration clause by casting their complaints in tort rather than contract.

and further at Page 4:

> . . . the sole issue is whether Nitram and IRI may be bound by the clause in the GHH/BBEC contract.
>
> GHH argues that both Nitram and IRI are, in reality, asserting claims as third-party beneficiaries to the BBEC contract and . . . should be bound by the arbitration clause.

and finally at Pages 5-6:

> The Court concluded that Triangle was equitably estopped from denying the applicability of the arbitration clause because its claims were "intimately founded in and intertwined with (McBro's) underlying contract obligations."
>
> This Court finds that this theory applies equally to the case at bar. Nitram and IRI fashion their claims against GHH in tort and breach of warranty. These claims are not common tort claims because . . . the close relationship between the parties and between the alleged wrongs and GHH's contractual duties gives one pause . . . All of Nitram's claims, and IRI's as subrogee, arise from alleged defects in the

> expander and GHH's supervision of its installation. Given this situation, the Court finds that Nitram and IRI's claims are intimately founded in and intertwined with GHH's underlying contractual obligations. The Court finds that both Nitram and IRI are bound by the arbitration clause and GHH/ BBEC contract.

On January 4, 1993, Judge Kovachevich denied the Claimant's application for a preliminary injunction or Motion to Compel Arbitration. In doing so, she stated at Page 2:

> The Court cites with approval, and adopts and incorporates by reference herein, the respondents opposition to the Motion for {a} Preliminary Injunction.

The issue before Judge Kovachevich was stated by the Claimant to be:

> . . . whether, in the consolidated arbitration proceedings currently pending before the American Arbitration Association . . . Nitram and BBEC will be allowed to assert new breach of contract claims against MAN GHH relating to three separate purchase order contracts between those parties. . . .[3]

The Respondent's response to the motion dealt with the relationship between all of the contracts and the parties and Nitram's position as a subrogee.

---

3. Claimant's memorandum in support of its motion beginning at P1.

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In addition to these judicial determinations, the panel itself denied the Claimant's motion to strike claims based on several contracts. This fact was urged upon Judge Kovachevich as an additional reason for preventing the panel from considering these issues.

We conclude that this panel is entitled to consider all of the issues which the parties have placed before us. In reaching our conclusion, we have been mindful of the language and policy of the judgments by Judges Carr and Kovachevich. We also have reviewed the case authorities presented to us by the parties and the language of the arbitration clause which is applicable to this case. Although, in our view, the issue has been determined judicially, the panel itself, in the exercise of its mandate, concludes that it has the necessary jurisdiction.

We find it unnecessary to resort to contracts other than the so-called "main" contract for the design, manufacture, and delivery of the tail gas expander.

Applicability of Contractual Damages Limitation

Change Order No. 1 at Page 2 contains the following provision:

> Any further claims for damages, especially for indirect and/or consequential damage including but not limited to loss of profit, loss of production, loss of interest, etc., for whatever legal consideration they may be raised shall be excluded.

It is the position of the Respondent and the Insurers that these words are not a binding provision of the contract between the Respondent and the Claimant. The panel does not agree.

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It its proposal in Paragraph 1.5, the Claimant gave a warranty limited to repair and replacement of parts during a twelve month period. Paragraph 1.5.1 was a performance guarantee whereby the purchaser could reject the machine. Paragraph 1.7 was entitled "Total Liability." It stated:

> We shall be liable for the circumstances specified under Clauses 1.3, 1.5, 1-.5.1, and 1.6 and to the extent stated thereunder, With the total amount of damages for delayed delivery {1.3} and non-achievement of the guaranteed performance figures {1.5.1} being limited to a maximum of 10% of the value of the equipment supplied. Article 1.8 dealt with arbitration.
>
> Any further claims for damages, especially for indirect and/or consequential damage including but not limited to loss of profit, loss of production, loss of interest, etc., for whatever legal consideration they may be raised, shall be excluded.

By a telex dated January 12, 1984, the Respondent proposed revisions to the above noted paragraphs. If the machine were to fail to meet the performance guarantee within 10%, all monies expended on the machine were to be returned. The Respondent took exception to the damages limiting provision proposed previously by the Claimant and stated that the Respondent would agree only to whatever limitation of liability it was able to extract from Nitram. It concludes with these words:

> Any exceptions by GHH to the contents of this telex must be brought to the attention of the undersigned immediately.

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On January 16, 1984 the Claimant replied stating that the Respondent's "order has been *in principle* accepted." (emphasis added). The last paragraph of the telex states:

> GHH's formal order confirming may include some comments on your commercial terms and conditions, especially those pertaining to liability, since amongst others the question of total liability still needs to be clarified.

By a telex dated January 20, 1984, the Claimant provided further comments. It stated: "*In principle* we agree to the terms and conditions of your TLX . . . we comment on *some points* . . ." (emphasis added). The last substantive portion of the telex states:

> Re: Total Liability:
>
> With reference to delivery period {1.3}, warranty/ guarantee {1.5} and third party liability, with U.S. $3.5 million we agree to your proposal.

In April the parties executed the Purchase Order and Change Order No. 1. Page 2 of the Change Order states, *inter alia*, that Clause 1.7 of the Claimant's proposal is to be revised in accordance with its telex of January 20, 1984. As noted above, that page includes the wording limiting liability for damages.

It is apparent that the commercial terms of the contract were not settled before the execution of the Purchase Order and Change Order No. 1. Both documents are on the letterhead of the Respondent. Although professing that the Respondent did not intend to have damages limited, no witness for the

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Respondent and the Insurers could explain why it had incorporated the limiting language in the documents. Mr. Hecker, the Claimant's employee responsible for the administration of the contract, was adamant that this was done to reflect the course of dealings between the parties and that the Claimant would not have signed the documents if damages were not limited in accordance with its proposal.

The panel concludes that the provisions purporting to limit damages are part of the contract between the Claimant and the Respondent.

Applicability to the Damages Claimed

The Claimant contends that the provision excludes its liability for the type of damages claimed by the Respondent. The panel does not agree. It is our opinion that, at best, the provision limits consequential damages arising out of the Claimant's failure to meet the delivery schedule or its non-achievement of the guaranteed performance criteria. This construction is consistent with the format of the Claimant's proposal. Clause 1.7, although entitled "Total Liability," deals specifically with damages related to the delivery schedule and the performance criteria. The further limiting language is not expanded to include causes beyond delayed delivery and non-achievement of the performance guarantees. The proviso makes no reference to negligence. It is our conclusion that the provision has a limited application which would not extend to the claims of the Respondent even if they were characterized as indirect, consequential, loss of profits, loss of production, loss of interest, etc. It is not worded to provide the exclusive remedy for which the Claimant contends.

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Existence of Fraud In Fact

Although we are satisfied that our jurisdiction extends to the allegations of fraud, we find no fraud. The weight of the evidence, both in testimony and documents, does not establish fraud and supports the reasonably held opinion of the Claimant that it was capable of providing the expander as required and that additional testing in Germany was not necessary. In addition, the evidence does not establish sufficient reliance by the Respondent or by Nitram on the alleged misrepresentations of the Claimant. The testimony of Mr. Ross before us defeats fraud against Nitram. Mr. Grandusky expressed his concerns, but they were overruled by his superiors at the Respondent.

Performance Requirements

The Claimant was obliged to undertake a performance test to confirm the operation of the machine in accordance with certain criteria. The test was to be undertaken within three months from commissioning. By an exchange of correspondence between the parties (Claimant's Exhibits 98 and 45) it was confirmed that commissioning occurred on June 12th of 1985. Clause 1.5.1 of the Claimant's proposal stated:

> Proof of achievement of the guaranteed values shall be furnished during trial operation or subsequent thereto with a clean machine.
>
> If such proof is not furnished within the period of three months from commissioning for reasons not imputable to us, it shall be considered as having actually been furnished.

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. . . . .

> Prior to the beginning of performance testing we shall be given the possibility of inspecting the machine and carrying out preliminary tests in accordance with the conditions of the contract. If the guaranteed figures are not achieved, you shall grant us a reasonable period for correcting deficiencies and, if necessary, give us the possibility of making further tests.

The machine was tested in November 1985. It met all requirements except inlet pressure. That pressure could have been adjusted, but to do so would have required opening the machine and concomitant down-time. Nitram chose not to have the machine opened at that time. When it was opened on subsequent occasions, Nitram did not require the adjustment. Mr. Dan Ross, the technical manager of Nitram, testified that the machine exceeded its output requirement and that it was acceptable to his company.

It is the position of the Claimant that it was not given the opportunity to prove the "achievement of the guaranteed values" within three months from commissioning. Pursuant to clause 1.5.1, the criteria are deemed to have been met.

The Respondent and the Insurers say that a performance test was undertaken and failed in late August or early September, that is, within the three-month period. They say that the November test was the second attempt by the Claimant and, pointing to the inlet pressure result, the machine failed.

It is the decision of the panel that the Claimant did not breach the performance criteria of the contract. It was given no notice

of the August-September test which meant that it had no opportunity to ensure that the machine was clean prior to or to undertake preliminary testing in preparation for a performance test. By operation of the contract, proof of the achievement of the guaranteed values is deemed to have occurred. In any event, we accept the evidence of Mr. Ross. If the ultimate user of the machine has no quarrel with its performance, we are satisfied that the machine met the requirement of the contract for its supply. In any event, the owner elected not to have the machine adjusted to resolve the inlet pressure short-coming, which could have occurred at the time of the November test.

Was Claimant Negligent or in Breach of Contract?

Dr. Sandstede testified that the cool down (shut-down) case was not investigated by the Claimant. The evidence suggests that there was a confusion about the need for auxiliary cooling air during shut-down. These design deficiencies or underestimations by the Claimant resulted in changes to axial clearances. It is probable that the Claimant was negligent and in breach of contract with respect to these matters. After a careful examination of the facts, an extensive review of the available evidence, including that which related to the physical condition of the machine after the January, 1985 "wreck" and constructive discussion among panel members, it is our opinion that these design deficiencies or underestimations by the Claimant did not cause the January, 1985 "wreck"

The Respondent and the Insurers assert that the Claimant incorrectly designed the expander because it determined the radial clearances following incorrect thermal distribution assumptions. The case advanced by the Respondent and the Insurers is based upon the expert evidence of Dr. Palazzolo and Mr. Jackson.

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Dr. Palazzolo undertook extensive finite element analyses. It was his conclusion that the Claimant was in error in setting clearances based upon the assumption that the temperature distribution in the machine was axisymmetric. This opinion was based, *inter alia,* on temperature data obtained at the June, 1985 successful start-up.

Dr. Palazzolo made no attempt to verify the accuracy of the data. They showed a temperature differential from the top to the bottom of the casing of approximately 300F degrees. Dr. Palazzolo had never seen a temperature differential from the top to the bottom of a casing of 300F degrees or even of 100F degrees. The data were internally inconsistent in that there were significant temperature differentials on either side of the casing halves, with respect to the centre location (for example, see data at 16:30 hrs.)

The temperature readings were obtained under the direction of Mr. Esins. He testified that there were problems obtaining the readings with a hand-held instrument. As the temperature increased, the men taking the readings encountered a great deal of difficulty. He stated firmly that the readings were not reliable. Dr. Sandstede testified that the Claimant made no use of the readings because they considered them to be wrong and contrary to engineering logic. The Respondent and the Insurers offered little evidence which could support the integrity of the readings.

The panel finds that the temperature readings relied upon by Dr. Palazzolo are unreliable. In these circumstances his opinion that the Claimant was in error in assuming an axisymmetric temperature distribution is rejected.

Dr. Palazzolo testified that if one relied on the Claimant's data, his model predicted there would be clearance increases. He

stated that he had formed no opinion whether there would have been a January, 1985 "wreck" if the temperature distribution were axisymmetric.

Jackson opined that the radial clearances used by the Claimant were insufficient. This conclusion was based upon the following assumption:

> A . . . "it's my belief that the rotor expands both radially and axially faster than the casing".
>
> Q . . . "That's one of the two key foundation . . . on which you are basing your opinion that the clearances in this machine were too tight or too small?"
>
> A . . . "That in combination with the heating rates that's applied to these elements".

Mr. Jackson assumed that the heating rate, that is, the rate of increase in temperature, was "something like 450F degrees per hour, which to me is excessive. . . ." The heating rate was established after consultation with Mr. Ross of Nitram. It was required by the process conditions in which the expander was to be used. In fact, the heating rate was not relevant to the January and March "wrecks". Claimant's Exhibit 12 shows that the January rate was between 100F - 200F degrees per hour for the expander. On the day before the March "wreck" the heating rate was over 300F degrees per hour. On the day of the wreck itself the rate was approximately 200F degrees per hour.

The panel rejects Mr. Jackson's belief that the rotor expands faster than the casing. We accept the evidence of Dr. Sandstede

that the reverse is true, that is, that the casing leads the rotor. We are satisfied that Dr. Sandstede's explanation based upon the thin-walled casing and the massive rotor is correct.

In the result, the panel rejects the case which the Respondent and the Insurers presented to establish that the Claimant improperly designed the expander.

The Respondent and the Insurers also base their case on the Claimant's documents and on testimony, especially cross-examination. A good deal of this evidence is circumstantial because it depends upon interpreting documents, particularly drawings. There were anomalies in the drawings which raised suspicion in the mind of the Respondent and the Insurers. The Claimant's witnesses explained the use to which its drawings and data were put and explained the anomalies. The panel accepts their explanations.

The evidence is that the clearances were tight. There is no direct reliable evidence that they were inadequate. The Respondent and the Insurers rely on the fact that radial clearances were increased after the "wrecks". It is asserted that this fact leads probatively to an admission that the Claimant knew that the clearances were inadequate. Dr. Sandstede was adamant that the increases were due solely to machining and not to design. He was cross-examined at length on the issue.

The panel is satisfied that the radial clearance increases between the rotor blades and the stator blade carrier, after the January, 1985 "wreck", were attributable to the machining of the damaged stator blade carrier. On the main rotor used after the March, 1985 "wreck", observed additional increases in radial clearance in the rotor blade area were caused as a result of machining of the rotor (shaft).

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With respect to increases in radial clearances in the inlet labyrinth seal and balance piston seal area, the panel notes a comment in the German language on Exhibit 39 "B" filed by the Respondent and the Insurers. It states:

> "To protect the system against loss of cooling steam during extended plant disturbances the axial and radial clearances were increased".

This note is not without ambiguity, but appears to be somewhat at variance with the position taken by the Claimant. No direct questions on this note was put to Dr. Sandstede or any other witness of the Claimant. The available evidence is clear that the spare components already were at the site. They had been delivered prior to the January, 1985 "wreck". The panel has considered these facts and while there are questions in our minds, we remain satisfied that increases in the radial clearances in the machine were mainly the result of repairs and were not design changes.

In summary, the panel finds that the design process as described by Dr. Sandstede was appropriate and not negligent. The Claimant was neither negligent nor in breach of contract with respect to the radial clearances in the machine as supplied in November, 1984.

The January, 1985 "Wreck"

It is common ground that the Respondent exceeded the allowable pipe loads specified by the Claimant. The panel rejects the notion that these parameters can be exceeded with impunity.

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Both sides adduced expert opinion evidence concerning the piping. This evidence was considered carefully by the panel. It is our finding that the weight of the evidence leads to the conclusion that the January, 1985 "wreck" was caused by the piping. We prefer the evidence of Messrs. Hansen, Fillastre and Chakrabarti to that of Mr. Eisenstein.

Mr. Hansen was called as a witness by the panel. This was a result of the opposition by the Respondent and the Insurers to the Claimant calling Mr. Hansen. Both sides agreed to the procedure which was followed. The Respondent and the Insurers feared that matters of confidence might be disclosed by Mr. Hansen. His earlier analyses of the piping were known to both sides. His subsequent efforts were explained fully and subjected to cross-examination. Although his evidence supports the Claimant's position, the Respondent and the Insurers should harbour no fear that the panel was influenced in any way by any information that Mr. Hansen may have received in confidence.

Although the position that a party takes contemporaneously with an event does not foreclose a revision of that view, the contemporaneous reaction is relevant. In this case, overwhelmingly, those involved at the time concluded that the piping caused the January, 1985 "wreck". Consistent with that view, the Respondent undertook a large number of changes to the piping. This evidence is consistent with the expert opinions introduced by the Claimant.

The inlet piping was designed and supplied with pre-set. It is debatable whether it was installed with pre-set. There was conflicting evidence concerning the movement of the inlet pipe when it was unbolted after the January, 1985 "wreck". The panel

has concluded that it is not necessary to resolve this conflict. Leaving this incident aside, the panel is satisfied that all of the evidence taken as a whole establishes that the piping caused the January, 1985 "wreck". The panel does not identify the specific mechanism which caused the wreck or the exact loads which were imposed on the expander. Different theories were given. Regardless of the specific mechanism of the imposition of the loads on the expander, we are satisfied that they were of sufficient magnitude to cause the "wreck".

The March, 1985 "Wreck"

The panel accepts the evidence of Mr. Esins that the machine was lifting at one of its corners. We find that his response was understandable and appropriate.

The absence of an expansion joint in the vertical line above the inlet nozzle left the machine vulnerable to huge moments caused by small movements of the pipe. At least one of the anchor rods which had been supplied to prevent such small movements was loose.

In addition, the panel accepts the evidence of Mr. Fillastre. He stated that the outlet line oscillated up and down three or four times. We are satisfied that that is indicative of the presence of significant forces in the piping system and that these forces imposed serious and damaging loads on the expander.

The panel finds that the March, 1985 "wreck" was caused by the piping.

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Claimant Entitlement

Claimant's Exhibit 96 contains three invoices for the amounts claimed.

The first invoice is for 5,592.81 DM being the exchange rate differential as a result of the late payment of sums owing under the contract. The Terms of Payment are set out at page 3 of the Purchase Order as "net 30 days". On evidence, the Respondent breached this requirement. The Claimant suffered damages as a result of a falling exchange rate. It is entitled to recover its loss and we so award.

The 2nd and 3rd pages of Claimant's Exhibit 96 are invoices in the amount of 58,395 DM and 52,176 DM respectively and relate to the work of Messrs. Esins and Matthes in May and June, 1985. Their efforts were in addition to the normal requirements of the supply of the expander and were caused by the March and January "wrecks". The Claimant quite properly took steps to ensure that the piping for the June start-up was appropriate. This work of Messrs. Esins and Matthes were caused by the failure of the Respondent to provide proper piping prior to the January and March "wrecks". It is recoverable by the Claimant.

The total amount awarded to the Claimant is 218,387.96 DM which includes appropriate simple interest at 12% from January 1, 1986 to May 1, 1993. Although requested to do so, the Claimant has provided to the panel a U.S. dollar figure. We retain jurisdiction to deal with any problems which arise as a result of converting the DM figure to U.S. dollars.

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Respondent and the Insurers Entitlement

The Respondent and the Insurers are not entitled to any money from the Claimant.

Costs

The Respondent takes the position that costs should follow the event and that attorney's fees are recoverable under the Florida International Arbitration Legislation. The Claimant says that attorney's fees are not recoverable as a matter of law. Claimant agrees to absorb the filing fees it paid to the American Arbitration Association (AAA), the costs of interpreters and the costs of Mr. Hansen.

The panel's Award, in summary, is as follows:

(i) the Barnard and Burk Respondents shall pay to the Claimant DM 218,387.96;

(ii) any claims advanced by the Claimant against the Respondent ISI, Inc. and the Insurers is dismissed;

(iii) the claims of the Respondent and the Insurers against the Claimant are dismissed;

(iv) the Claimant shall recover from the Respondent and the Insurers all of the Claimant's costs of the arbitration, excluding attorney's fees, the filing and postponement fees it paid to the AAA, the costs of interpreters and the costs of Mr. Hansen; the

recoverable costs do not include the mediation which we consider to be a separate proceeding.

The dismissal of the Claimant's claims against the Respondents other than the Barnard & Burk Respondents is of no consequence to the costs. Essentially, the Respondent and the Insurers were the real Claimants in this case. The Claimant was obliged to meet the case advanced against it by those parties and it is entitled to recover its costs for successfully doing so. The Claimant does not pursue attorney's fees because it holds the opinion that they are not recoverable as a matter of law. It considered the other concessions to be appropriate. As noted previously, the panel retains jurisdiction to resolve issues of quantum and entitlement if the parties were unable to agree on the quantum of costs payable.

Return of Documents

The parties agree that the Respondent and the Insurers should return to the Claimant all documents which represent the confidential proprietary rights of the Claimant. The panel so orders. The panel retains jurisdiction to resolve any disagreements on the material or the timing of its return.

At the conclusion of the hearing we expressed our appreciation to counsel and to the parties for presenting to us a complex and difficult case in an orderly and gentlemanly fashion. We reaffirm those sentiments. The path down which the parties have walked has been very long and arduous. Our objective has been to ensure that the parties had a full and fair hearing and that our Award finally ended this lengthy saga. For that reason we provided to the parties a list of issues which we

understood were required to be determined. We invited them to supplement that list. They did not do so. Although our conclusions on the merits may have made it unnecessary to deal will all issues, save for those which dealt solely with the quantum of the Respondents claim, we have done so in order to ensure that the parties now can put these unfortunate events behind them.

Therefore, except as heretofore provided, this Award is in full settlement of all claims and counterclaims submitted to this arbitration.

DATED at the City of Vancouver, British Columbia, Canada this 30 day of April, 1993.

s/ Edward C. Chiasson
Edward C Chiasson, Q.C., Chairman

DATED at Stockton-on-Tees, Cleveland, Great Britain this 7th day of May, 1993

s/ Otto Von Bertele
Mr. Otto Von Bertele — Arbitrator

DATED at Sugar Land, Texas, United States of America this 3 day of May, 1993

s/ Rakesh K. Bhargava
Dr. Rakesh Bhargava — Arbitrator

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED JULY 23, 1998

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 94-2982

INDUSTRIAL RISK INSURERS, BARNARD & BURK GROUP, INC., BARNARD AND BURK ENGINEERS AND CONSTRUCTORS, INC., ISI, INC., AMERICAN HOME ASSURANCE CO.,

Defendants-Third-Party-Plaintiffs-Appellants,

versus

M.A.N. GUTEHOFFUNGSHUTTE, GmbH,

Third-Party-Defendant-Appellee-Cross-Appellant.

On Appeal from the United States District Court for the Middle District of Florida

BEFORE: TJOFLAT and EDMONDSON, Circuit Judges, and NANGLE*, Senior District Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellant is denied.

---

* Honorable John F. Nangle, Senior U.S. District Judge for the Eastern District of Missouri, sitting by designation.

Appendix E

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX F — STATUTORY PROVISIONS INVOLVED

9 U.S.C. § 201

* * *

§ 201. Enforcement of Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States Courts in accordance with this chapter.

* * *

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may

on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

1. Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under

the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

Appendix F

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contain decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

Appendix F

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that county; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the county where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 [27 LNTS 157; 92 LNTS 301] shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Appendix F

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice [T.S. 993; 59 Stat. 1055], or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the Federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Supreme Court, U.S.
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No. 98-650

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

NITRAM, INC., INDUSTRIAL RISK INSURERS, BARNARD & BURK GROUP, INC., BARNARD AND BURK ENGINEERS & CONSTRUCTORS, INC., ISI, INC., AMERICAN HOME ASSURANCE CO.,

Petitioners,

vs.

MAN GUTEHOFFNUNGSHÜTTE GmbH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

1. Whether this Court should review the court of appeals' holding that, for purposes of federal court proceedings to confirm an international arbitral award, the district court's review should be governed by Chapter 2 of the United States Federal Arbitration Act (9 U.S.C. §§ 201-208) and the international treaty which it adopts, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, rather than by either the laws of the State of Florida or the arbitration rules of the American Arbitration Association?

2. Whether this Court should review a single fact-specific evidentiary ruling made by an international commercial arbitration panel and upheld by the federal courts during subsequent proceedings which confirmed the international arbitral award pursuant to Chapter 2 of the United States Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

LIST OF ALL PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding except that: (1) Nitram, Inc., which is listed only in the caption, should be dismissed as a petitioner because it has no interest in this matter; and (2) the petitioners' list neglects to include the name of the respondent which is MAN Gutehoffnungshütte GmbH.

Pursuant to Supreme Court Rule 29.6 the parent company of the respondent, MAN Gutehoffnungshütte GmbH, is MAN AG. There are no nonwholly owned subsidiaries of respondent.

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Respondent MAN Gutehoffnungshütte GmbH ("MAN GHH") respectfully submits this brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case. The petition raises no issues that merit plenary review.

COUNTERSTATEMENT OF THE CASE

This proceeding arises from an amended final judgment in which the district court confirmed a series of three arbitration awards issued in 1993 by an international commercial arbitration panel of the American Arbitration Association. The arbitration dealt with numerous claims and disputes which arose between the parties during the course of the design and construction of a major modification and expansion project for a nitric acid fertilizer plant near Tampa, Florida. The project began in 1983, was completed finally during 1985, and spawned complex federal court litigation commencing in 1985 and related international arbitration which began several years later.

The arbitration claims focused on the design, fabrication, and construction of a high-temperature, high-pressure "tail" or waste gas process piping system and the design, fabrication and installation of a large energy-recovery turbine known as a "tail gas expander" at the nitric acid plant. The tail gas expander, which was manufactured by the respondent, is installed on a structural steel and concrete foundation pedestal in the nitric acid plant as part of a "train" or row of other pieces of machinery connected to one another such as, for example, a large air compressor. The expander turbine is connected at each end to the waste gas process piping designed and constructed by the petitioners and the hot tail gas from the nitric acid manufacturing process flows through the expander driving its rotor. The mechanical energy generated from the process is used to power other equipment in the plant thereby reducing

the plant's dependence on other power sources such as electricity, reducing costs and increasing operating efficiency.

The arbitration proceedings spanned almost three years. Following extensive preliminary proceedings including exchanges of large quantities of documents, the arbitration culminated in twenty-two days of hearings before the arbitration panel that were held in Tampa over two different sessions during January and March of 1993.[1]

As can be seen from the first "Award of Arbitrators" of May, 1993, a unanimous panel rejected the petitioners' claims completely concluding, as a matter of fact, that the "wrecks" of the turbine equipment during attempts to start up the nitric acid plant in January and March of 1985 both had been caused solely by the defectively designed and constructed process piping system connected to the turbine. Pet. App. D at 52a.[2] Accordingly, the panel dismissed the petitioners' claims (including the insurers' subrogation claims), concluded that the petitioners had refused wrongfully to pay MAN GHH for three invoices for additional work that had been ordered by the various petitioners on the fertilizer plant project and currency exchange losses due to late payments, and awarded MAN GHH its costs for the arbitration.

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1. The case between MAN GHH and the petitioners was heard and decided by three international arbitrators selected by the parties under the auspices of the American Arbitration Association. The panel consisted of, as chairman, a senior Canadian trial lawyer (a designated "Q.C." or Queen's Counsel and an experienced arbitrator), and two engineers, one a Ph.D. in mechanical engineering from India and the other a rotating equipment engineering specialist from Great Britain.

2. References to "Pet. App." refer to the Appendix filed by the petitioners as part of their petition in this matter.

The losing parties in arbitration filed several motions to vacate the arbitral awards in the district court. On September 23, 1993, MAN GHH filed its petition to confirm the final arbitral awards in its favor. On March 23, 1994, the district court entered its order which both denied the various motions to vacate the arbitrators' awards and granted MAN GHH's petition to confirm. In its opinion, the district court rejected the petitioners' claims that there was no evidentiary basis for the arbitrators' awards, that the arbitrators had acted "arbitrarily, irrationally and capriciously" in admitting various evidence (including the so-called "TÜV" report), and that the awards violated public policy. *See Nitram, Inc. v. Industrial Risk Insurers*, 848 F. Supp. 162 (M.D. Fla. 1994), *aff'd sub nom., Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434 (11th Cir. 1998); Pet. App. C at 40a.

On appeal, the United States Court of Appeals for the Eleventh Circuit again rejected the petitioners' claims that the procedures observed by the arbitrators were not in accordance with the rules of the American Arbitration Association and the agreement of the parties, that the awards violated public policy, and that the arbitrators did not conduct a "fundamentally fair" hearing. *See Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434 (11th Cir. 1998); Pet. App. A at 1a. Petitioners requested a rehearing, raising largely the same issues advanced in their petition, which the Eleventh Circuit denied without comment.[3]

In their petition, the petitioners contend that an international arbitration panel's decisions to admit a technical engineering report and to allow testimony concerning this report resulted in a denial of their procedural due process rights. As

3. The petition for rehearing was denied by the court of appeals in an order dated July 23, 1998. The petition for writ of certiorari indicates an incorrect date of August 23, 1998.

detailed below, there is no cause for this Court's review of the petitioners' factbound contention which has been rejected now by the arbitration panel, the district court, and the United States Court of Appeals for the Eleventh Circuit. Substituting hyperbole about "an unfair and prejudicial proceeding" and the like for an accurate description of the underlying facts, the petitioners have distorted the procedural history of this case.

The evidentiary record from the arbitration is substantial, consisting of 325 composite exhibits containing over 10,000 pages, deposition transcripts for over forty witnesses, and hearing transcripts for some twenty witnesses who appeared live to testify before the panel. Out of this sea of paper, the petitioners have now focused their challenge to the lower courts' confirmation of the international arbitral award exclusively on the arbitration panel's decision to admit into evidence a single technical report, the so-called TÜV report.[4] Putting aside the fact that the Award of Arbitrators, Pet. App. D at 52a, does not even mention, much less rely on, the TÜV report, the petitioners have fundamentally mischaracterized the circumstances surrounding the arbitrators' decision to admit the report into evidence during the arbitration hearing.

In particular, the petitioners have contended that MAN GHH did not timely produce the TÜV report, as required it is asserted by a pre-hearing order of the arbitration panel. While it is correct that the petitioners' counsel did not review the report and request a copy of it until January 8, 1993 — the Friday before the Monday when the arbitration hearings began — the arbitration panel, the district court, and the United States Court of Appeals for the Eleventh Circuit all heard and rejected

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4. MAN GHH would note that, apparently, the petitioners have abandoned any argument concerning the admission of the testimony of Donald Hansen, a specialist in pipe stress analysis who was called as a witness by the arbitration panel to testify at the arbitration hearing.

completely the petitioners' argument that the admission of the TÜV report during the arbitration violated the panel's prior order.[5] Thus, there is simply nothing in the record to support the petitioners' claim or assumption that orders of the arbitration panel were "violated," thereby possibly constituting a denial of due process.

The petitioners' presentation of the procedural history of this matter also conveniently ignores the timing issues. The TÜV report was not admitted into evidence by the arbitration panel until March 26, 1993, well over two months after it had been provided to the petitioners. Indeed, the petitioners never requested a continuance from the arbitration panel in order to prepare any response to the TÜV report. Instead, as noted by both the district court and the court of appeals, the petitioners had "ample opportunity" to prepare for and rebut the document in question. The record in this matter reflects that the petitioners were allowed to cross-examine various witnesses during the arbitration hearings about the TÜV report and also presented expert witnesses of their own for rebuttal purposes.

A central premise of the petitioners' arguments to this Court is the petitioners' assertion that the Eleventh Circuit's opinion expresses its refusal to recognize the applicability of due process principles in the international arbitral proceeding in this matter. However, the text of the Eleventh Circuit's opinion explicitly refutes the petitioners' position. To begin with, the Eleventh Circuit recognized that arbitration proceedings "need provide only a fundamentally fair hearing." *Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1443 (11th Cir. 1998). Indeed, this is the very language used by the

5. "We hold that the admission of the TÜV report was in accordance with the AAA rules and therefore with the agreement of the parties." *Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1443 (11th Cir. 1998).

petitioners. The Eleventh Circuit also discussed the petitioners' arguments that, "the proceedings were fundamentally unfair" and indicated that the availability of this defense was "an open question." *Id.* at n.11. However, the Eleventh Circuit considered the petitioners' due process arguments on the merits, stating,

> [w]e need not decide this question, however, because it is apparent that the admission of Hansen's testimony and the relatively late provision of the TÜV report did not render the proceedings fundamentally unfair.

Id. Thus, contrary to the petitioners' statement of the case to this Court, the Eleventh Circuit did consider the petitioners' due process arguments but found them to be meritless.

REASONS FOR DENYING THE WRIT

The unanimous opinion below involved nothing more than the court of appeals' approval of the district court's decision to confirm an international arbitral award in a dispute between several United States companies and their insurers on the one hand and a German-based equipment manufacturer on the other. Petitioners present several issues, none of which is worthy of certiorari, for reasons that can and will be stated in short order. In essence, the petitioners raise merely case specific factual issues which are not of general importance and do not present any conflict among the circuits or with any of this Court's decisions. This is nothing more than a challenge by the losing parties in arbitration to the arbitration panel's ruling to admit a single document into evidence, parties who subsequently aired their arguments fully first at the district court then at the court of appeals losing on both occasions. The petition is bereft of anything that would suggest any "special and important reasons" for the Court to review this case. For all of these reasons, the Court should deny the petition.

I.

THE PETITIONERS' CLAIM THAT A FEDERAL COURT'S REVIEW OF AN INTERNATIONAL ARBITRAL AWARD RENDERED IN THE UNITED STATES SHOULD BE GOVERNED BY EITHER FLORIDA STATE LAW OR THE RULES OF THE ORGANIZATION WHICH ADMINISTERED THE ARBITRATION DOES NOT MERIT REVIEW BY THIS COURT.

For the first time in the federal court confirmation proceedings which have followed the international arbitration, the petitioners have advanced the novel argument to this Court that, when determining whether to confirm or vacate an international arbitration award, the federal courts ought to be governed in their review not by either the Federal Arbitration Act or the New York Convention but, rather, the courts should evaluate the arbitrators' conduct of the arbitration proceedings and their arbitral decision by applying only the rules of the American Arbitration Association and the laws of the State of Florida. Not surprisingly, the petitioners fail to cite a single United States court decision to support their claim that the court of appeals erred in holding in this case that, in reviewing an international arbitral award made in the United States, a federal court should be guided by the principles of Chapter 2 of the Federal Arbitration Act and the treaty which Chapter 2 incorporates into United States law, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known commonly as the "New York Convention."[6]

While it is correct, as petitioners assert, that this Court has not had the occasion to address the relationship of the New

6. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3.

York Convention to Chapter 2 of the Federal Arbitration Act and their applicability to the enforcement of a specific international arbitral award, the petitioners have neglected to acknowledge that the court of appeals' decision in this matter applying the New York Convention is consistent with and not in conflict with the decisions of the other circuits which have addressed the issue. The First, Second, Seventh and Ninth Circuits previously and now the Eleventh Circuit all have held that the New York Convention and Chapter 2 of the Federal Arbitration Act govern the enforceability of those arbitral awards which involve at least one party which is domiciled or has their principal place of business outside of the United States. *See Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983); *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 18-19 (2d Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 1042, 140 L. Ed. 2d 107 (1998) (Second Circuit held that New York Convention and, thus, Chapter 2 of the Federal Arbitration Act both applied to arbitral award issued by the American Arbitration Association in a dispute involving one United States corporation and two non-United States parties); *Jain v. de Méré*, 51 F.3d 686, 689 (7th Cir.), *cert. denied*, 516 U.S. 914, 116 S. Ct. 300, 133 L. Ed. 2d 206 (1995); *Ministry of Defense of the Islamic Republic of Iran v. Gould Inc.*, 887 F.2d 1357, 1362 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016, 110 S. Ct. 1319, 108 L. Ed. 2d 494 (1990) (the New York Convention applies to those arbitral awards which arise from a legal relationship which is commercial and *not* entirely domestic in scope); and *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186-87 (1st Cir. 1982).

Despite the petitioners' suggestion to the contrary, it has never been argued by the respondent herein (or any other party to these proceedings) nor has it been held by either of the courts below that Chapter 2 of the Federal Arbitration Act is the "sole" basis of the federal courts' subject matter jurisdiction in this

matter. Rather, although arguably the federal courts also have federal subject matter jurisdiction due to the parties' diversity of citizenship and the amount in controversy, there is little doubt that the court of appeals was correct in holding here that, pursuant to 9 U.S.C. § 203, the district court had original jurisdiction over this matter, regardless of the amount in controversy, because as a proceeding to enforce an international arbitral award, the matter arose under the New York Convention.[7] As such, the federal courts are obligated to review and either confirm or vacate the international arbitral award according to the standards of Chapter 2 of the Federal Arbitration Act and the New York Convention. There is absolutely no authority to support the petitioners' contention that the court of appeals should have ignored the standards of the Federal Arbitration Act and the New York Convention and judged the arbitration proceedings against some unspecified standards which perhaps are set by Florida state law. Simply put, any Florida state arbitration law — and the rules of the American Arbitration Association — are clearly inapplicable to a federal court's limited role in proceedings to confirm an international arbitral award as they are preempted by applicable United States federal law including the New York Convention.

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7. 9 U.S.C. § 203 provides:

> An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

II.

THE DECISION OF AN INTERNATIONAL ARBITRATION PANEL TO ADMIT ONE DOCUMENT — AMONG MANY — INTO EVIDENCE DURING THE ARBITRATION HEARING DOES NOT MERIT REVIEW BY THIS COURT.

The petition's factbound claim that the international arbitration panel's decision to admit a single piece of documentary evidence violated the panel's own earlier pre-hearing procedural order does not warrant review by this Court. At its core, the petitioners' argument is that the arbitrators wrongly decided the facts in this complex case concerning very technical mechanical engineering issues. The unanimous opinion of the court of appeals below involved nothing more than a decision to enforce an international arbitral award and was a plainly correct application of settled due process law. No conflict among the circuits on the application of due process principles in New York Convention international arbitration cases is even claimed by the petitioners. Indeed, the petitioners have not cited even one case in support of their "due process" argument.

Although the petitioners have attempted to portray this case as presenting substantial due process questions, the petition essentially seeks review of factual determinations made by the international arbitration panel which were confirmed by both the district court and the Eleventh Circuit. These routine factual determinations made by the arbitrators included interpreting the requirements of the arbitration panel's own pre-hearing orders, considering the amount of time between the production of the TÜV report to the petitioners and its admission into evidence, analyzing the availability of opportunities for the petitioners to prepare for and rebut the TÜV report, and resolving the materiality of the TÜV report. Likewise, despite

the petitioners' claim to the contrary, it is clear that the Eleventh Circuit in fact considered but rejected the petitioners' due process arguments on the merits. However, the petitioners disagree with the Eleventh Circuit's application of due process principles to the facts of this case or, perhaps, simply hope for a different outcome.

The petition implies there is a lack of case law concerning the applicability of due process principles to international arbitration cases arising under the New York Convention, as in this matter.[8] To the contrary, courts have held consistently that international arbitral awards may be challenged on due process grounds. *See, e.g., Generica Ltd. v. Pharmaceutical Basics, Inc.*, 125 F.3d 1123 (7th Cir. 1997) (arbitrator's limitation on cross-examination of witness did not amount to a denial of due process); *Iran Aircraft Industries v. Avco Corp.*, 980 F.2d 141 (2d Cir. 1992) (arbitration panel's decision to exclude certain crucial evidence when the panel had indicated earlier it would accept the evidence was denial of due process); *Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie du Papier (RATKA)*, 508 F.2d 969 (2d Cir. 1974); *National Oil Corp. v. Libyan Sun Oil Co.*, 733 F. Supp. 800, 813-16 (D. Del. 1990) (arbitration panel's admission of false and misleading testimony did not amount to a denial of due process, especially where party was able to present all of its arguments against consideration of evidence to the panel). Thus, there is simply no need for clarification by this Court concerning the applicability of due process principles to international arbitral awards which are submitted to the federal courts in the United States for confirmation.

Finally, the petition cites no authority which would even suggest, much less hold, that the arbitration panel's decision to

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8. Petitioners have conceded that this case arises under the New York Convention. (Pet. 5-6).

admit the TÜV report might amount to a denial of due process. Indeed, the petition does not cite any due process cases arising from the arbitration context. In particular, as the Eleventh Circuit noted in this case, it is axiomatic that, "[a]n arbitrator enjoys wide latitude in conducting an arbitration hearing. Arbitration proceedings are not constrained by formal rules of procedure or evidence." *Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1443-44 (11th Cir. 1998). Thus, although an arbitrator must provide a fundamentally fair hearing with adequate notice, a hearing on the evidence and impartial decision-making, "parties that have chosen to remedy their disputes through arbitration rather than litigation should not expect the same procedures they would find in the judicial arena." *Generica Ltd. v. Pharmaceutical Basics, Inc.*, 125 F.3d 1123, 1130 (7th Cir. 1997).

Indeed, there is not one case in the Eleventh Circuit or elsewhere (certainly the petitioners have not cited to any) in which a federal court has vacated an arbitral award because the panel accepted evidence that one party wanted the panel to exclude and not consider. But see, *Hayne, Miller & Farni, Inc. v. Flume*, 888 F. Supp. 949, 952 (E.D. Wis. 1995) (court notes, "the improper admission of evidence does not warrant vacation of the arbitration award"). Even if petitioners' factual assertions were accurate — which they are not — the arbitration panel's evidentiary rulings could not result in a denial of due process since the petitioners had the opportunity to object to the evidence before the panel and received limited judicial review thereafter. Indeed, even in cases arising under Chapter 1 of the Federal Arbitration Act, courts have refused to vacate arbitral awards due to the arguably untimely production of documents to be used at the arbitration hearing. *See, e.g., Trans Chem. Ltd. v. China Nat'l Mach. Import & Export Corp.*, 978 F. Supp. 266, 303-06 (S.D. Tex. 1997); *see also Mantle v. Upper Deck Co.*, 956 F. Supp. 719, 736-38 (N.D. Tex. 1997). Thus, the

the petitioners are seeking to invent due process "rights" which are unfounded under settled law and sound policy, and their effort to do so here does not warrant this Court's review.

CONCLUSION

For the foregoing reasons, the respondent MAN Guttehoffnungshütte GmbH respectfully submits the petition should be denied.

Respectfully submitted,

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